FICTIONS IN THE DEVELOPMENT OF THE HINDU LAW TEXTS

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C. SANKARARAMA SASTRI

FICTIONS IN THE DEVELOPMENT OF THE HINDU LAW TEXTS

THE LATE HON. V. KRISHNASWAMY AIYAR, C.S.I.

FICTIONS IN THE DEVELOPMENT OF THE HINDU LAW TEXTS

BEING

THE V. KRISHNASWAMY AIYAR LECTURES, 1925

DELIVERED UNDER THE AUSPICES OF

THE UNIVERSITY OF MADRAS

BY

C. SANKARARAMA SASTRI, M.A., B.L.

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AUTHOR'S NOTE

My revered Professor Mr. S. Kuppuswami Sastri, under whom I had the honour of studying for the B.A. Honours course in the Presidency College with *Vedānta* and *Mīmāṁsā* for my special portion, had often told me that it was one of his dreams to bring out a thesis himself on the present theme of my lectures. Although he did not himself find it convenient to put into effect his idea for want of time due to pressure of his professorial work, he has had the satisfaction of seeing it done by me to the best of my capacity. He it was that originally suggested to the University the present subject as deserving of special treatment by a lawyer learned in *Mīmāṁsā*. When I was called upon by the University of Madras to deliver a course of lectures upon this subject as the first nominee to the V. Krishnaswami Iyer Lectureship endowed by Mr. K. Balasubrahmania Iyer, I had the benefit of a consultation with my learned professor, who gave many valuable suggestions which I have followed out in the preparation of my lectures. I therefore feel it my duty to express my heartfelt gratitude to my professor. I take this opportunity also to

record my grateful thanks to the Madras University for giving me an occasion to publish certain of my views which have been arrived at by a comparative and critical study of the Roman, Hindu and English laws, and by research work carried on in Hindu Law and Jurisprudence.

At the suggestion of many an eminent member of the audience present at my lectures, the learned Advocate-General of the Madras Bar, Mr. T. R. Venkatarama Sastri, C.I.E., a learned Scholar of *Mīmāṁsā* as he is, has kindly undertaken to meet the cost of printing and publishing these lectures—a responsibility which, under ordinary circumstances, one would have expected the University itself to undertake. I have great pleasure in recording my profound gratitude to the learned Advocate-General for the love of scholarship exhibited by him and for the distinguished patronage he has condescended to extend to me. My respectful thanks are also due to the learned and esteemed Ex-Advocate-General of Madras, Sir P. S. Sivaswami Iyer, K.C.S.I., C.I.E., for his kindness in blessing my work with a Foreword.

I also express my sincere thanks to Mr. Sitarama Sastri, Superintendent of the Vasantā Press, Adyar, for the neat execution of this work.

Mylapore
9th August, 1926

C. SANKARARAMA SASTRI

FOREWORD

The subject chosen by the University for the first course of lectures to be delivered under the V. Krishnaswami Aiyer Lectureship Scheme was "Fictions in the Development of Hindu Law Texts". There is a propriety in the choice of the subject in view of the late Mr. Krishnaswami Aiyer's eminence as a lawyer, his attainments in Sanskrit and his desire to promote Sanskrit studies. The University authorities have been wise in their choice of Mr. Sankara Rama Sastri for the lectureship. A sound Sanskrit scholar and a learned lawyer well-grounded in the principles of English, Hindu and Roman jurisprudence, he has also the advantage of a close acquaintance with Purva Mimamsa, a knowledge of which is a most valuable, nay indispensable, aid in the interpretation and understanding of the texts of Hindu Law.

Fictions have played an important part in the development of law in many countries, especially in the early stages. But for them, progress in law would have been impossible under the conditions of the times when they were largely resorted to.

Legal fictions were some of the most useful expedients to which recourse was had by those engaged in the administration of law for the purpose of reconciling the need for change and reform with that respect for tradition and authority which is at the basis of all social order. Far from deserving the violent condemnation of Bentham, the men who invented these fictions deserve the gratitude of society for their efforts to improve and mould the law in accordance with the changing conditions of society and public opinion. The precise legal fictions which were adopted in particular systems have no doubt differed, but the part played by legal fictions in the development of law is the same in all systems of jurisprudence.

A large part of the lectures delivered by Mr. Sankara Rama Sastri is devoted to the exposition of the cardinal assumptions which are peculiar to Hindu Law. These assumptions relate to the authority of the Vedas as the all-comprehensive source of law. Hindu lawyers and philosophers did not consider it wise to base any system of rules of conduct, whether legal, social or ethical, upon a purely rationalistic foundation or upon the command of human authority. The authority of revelation could alone furnish the bedrock upon which a stable system of law and order could be founded. Starting from these principles, it is easy to understand how the development of law to suit the varying

conditions of times could have been brought about only by recourse to the expedients of legal fiction. Though fictions are professedly the subject of the course, the lecturer has devoted a considerable portion of his lectures to the exposition of several of the important canons of construction laid down in Mimamsa. These principles are essentially not different from the principles of interpretation with which students of English law are familiar. A study of these principles will be found to be as interesting as valuable.

Sudharma, Mylapore
3rd August, 1926

P. S. Sivaswamy Aiyer

CONTENTS

FIRST LECTURE

PAGE

PARADOX that fictions are real and permanent explained—The influence of fictions on Hindu, Roman and English laws compared—The three agencies by which law has developed, namely, fictions, equity and legislation, and the order of their operation—Sir Henry Maine's view reviewed—Fictions as defined by Bentham—As defined by Maine—Fictions never recognised as a source of law—Founders of Dharma s'āstras, branches of learning and law—Special sources of law under the Hindu system—The theory that all later law is embodied in the archaic law common to all systems of jurisprudence—How fictions improve the law—Survivals of fictions in the modern law—Fictions generally precede legislation—Illustrations from Roman and English laws—Procedure and Jurisdiction, the two branches of law coming within the sphere of the influence of fictions—*Fictio* as understood in the Roman law—Jurisdiction of courts over a non-citizen, an illustration of a fiction in the Roman law—Illustrations of fictions from the ancient law of England—Procedure in actions in Trover and Detinue, and in actions in Ejectment—Illustrations of fictions influencing jurisdiction of courts in England and the gradual enlargement of jurisdiction by the King's Bench and the Exchequer—Writ of latitat and Bill of Middlesex—The fictitious procedure in *Mancipatio* and *In Jure Cessio* under the Roman Law, and the Fines and Recoveries under the English law—The law of alienation in the Roman and Hindu systems mainly a creature of fictions—The different lines in which the Roman and Hindu laws of alienation have evolved—Formalities necessary for effecting an alienation according to Yājñavalkya,

PAGE

and the same as interpreted by Mitākṣarā—A brief history of the law of alienations in England in as far as it is an outcome of fictions—Fine and Recovery at common law explained—Maine's theory that procedure in all archaic law was disproportionately large, criticised—Maine's view that civil law is derived from criminal law, criticised—Both the motives for invention of fictions lacking in Hindu Law—A brief survey of the constitution of the ancient Hindu Judiciary—King and learned Brahmin mentioned by Gautama—Mention by Yājñavalkya of the Royal court, Pūga, S'reṇī, and Kula—Mention by Manu and Gautama of different bodies of rules—The exposition of Mitākṣarā defining the original and appellate jurisdiction of the different courts—Bṛhaspati on the constitution of courts—Kauṭalya on the same—No need for the usurpation of jurisdiction by fictions under the ancient Hindu Law 1

SECOND LECTURE

FICTIONS in the extended signification as understood by Maine found in plenty in Hindu Law—Classification of fictions into fundamental and derived—The three leading fundamental fictions about the Vedas—(1) the theory of omniscience of the Vedas, (2) Eternity of the Vedas—Difference among orthodox schools of thinkers, namely, the Nyāya, Vedānta, and Mīmāṁsā on Pauruṣeya Vāda and Apauruṣeya Vāda—(3) Infallibility of Vedas—Dharma defined by Jaimini—Distinction between Prābhākara and Bhāṭṭa schools as to meaning of Dharma—Classification of Vedas into Vidhi, Mantra, Arthavāda and Nāmadheya—Four tests for distinguishing Nāmadheya (1) Avoidance of Lakṣaṇā, (2) Avoidance of Vākyabheda, (3) Tatprakhyanyāya, and (4) Tadvyapades'a principle—Mantras, their chief function—Classifiction of the same into Ṛk, Yajus and Sāman—Their definition by Jaimini—Upakramādhikaraṇa—Arthavādas—Jaimini's view that the commanding portion of the Vedas is alone operative—Function of Arthavāda to eulogise or condemn acts referred to in Vidhis—Illustration of a commendatory and a condemnatory Arthavāda—Treatment of non-commanding portions by Mīmāṁsakas—Division of Arthavāda into (1) Guṇavāda, (2) Anuvāda, and (3) Bhūtārthavāda—Illustrations—Extent of modifiction of Vidhi by Arthavāda

PAGE

recognised by Mīmāṁsakas—Illustration—A smṛti illustration of the same principle from the law of adoption—The Mīmāṁsaka theory that a Vidhi cannot be modified in view of an Arthavāda—Hetuvannigadādhikaraṇa—Mandlik's view regarding the same criticised—Theories as to the origin of Smṛti from S'ruti—Theory of Lost S'ruti—Theory of Latent S'ruti and the theory of the Patent S'ruti—Merits of each theory discussed—Illustrations of Smṛtis derived from Siddhavan-nirdes'a in Vedas—Of smṛtis traced to fables narrated in Vedas—Instances of interrelation between S'ruti and Smṛti cited by Vis'varūpa—Instances of Smṛti rules involved by necessary implication in Vedas—Smṛtis traceable to Mantra or Arthavāda or to both 46

THIRD LECTURE

AUTHORITY of Smṛtis dependent on general acceptance by the public—Exceptions to the theory of Vedic foundation for Smṛtis, *e.g.* (1) in the case of a conflict between a S'ruti and a Smṛti—Illustration, Audumbarādhikaraṇa—Difference of opinion between S'abarasvāmin and Kumārila—Smṛti rule enjoining studentship for forty-eight years discussed—The rule permitting the eating of a sacrificer's food—The rule requiring Japa to be performed before the appearance of stars in the sky—(2) Exception where a smṛti is obviously intended to produce a visible result—(3) Where a Smṛti is based on an incorrect understanding of principles of Exegesis—Instances from Kalpasutras, (1) the rule of Āpastamba making the performance of Pas'upuroḍās'a optional in the Savanīyapas'u, (2) The rule of Āpastamba requiring all the sacrificial pillars in the Ukthya to be planted on the altar, (3) The rule of Āpastamba requiring the performance of a number of Patnīsaṁyājas in the Pas'vekādas'ini sacrifice, (4) the rule of Kātyāyana relating to the division of the sacrificial oblation into four quarters in the Āgneya and Agnīṣomīya sacrifices, (5) The rule of Āpastamba requiring the Paryagnikaraṇa of all sacrificial offerings—All conflict between S'ruti and Smṛti, only apparent—S'iṣṭākopādhikaraṇa—Occasional superiority of Smṛtis to S'rutis in the light of contents—Discussion of texts and the difference of opinion between Bhāṣya and Vārtika—Difference

PAGE

between Dṛṣṭārtha and Adṛṣṭārtha Smṛtis, Nyāya-mūla and Vacanamūla Smṛtis, and Vedasiddha and Lokasiddha smṛti texts—Classification illustrated from the six Vedāṅgas—Vedasiddha and Lokasiddha rules recognised in the Dharmaśāstras —Reference to the latter class of texts by Mitākṣarā . . 94

FOURTH LECTURE

AUTHORITY of custom dependent upon general acceptance by the public—Two tests to distinguish a valid custom—Conduct of a śiṣṭa and the consciousness of Dharma—Objectionable practices of ancient sages reported in authoritative works—Customs which have been the subject of controversy from time immemorial, valid in the school where prevalent—The fictitious foundation of a custom in Veda—Inferiority of custom to Smṛti—Presumption of a text of universal application from a custom of restricted prevalence—Holākādhikaraṇa—Distinction between the Mīmāṁsaka and the Modern juristic views as to the comparative weight of custom and written law due to difference in standpoints—Four classes of laws to be enforced by courts of justice under the Hindu Law—Dharma or equity, Vyavahāra or common law, Caritra or custom and Rājaśāsana or legislation—Discussion of conflict among the same—The theory that the sovereign is bound by the law equally with a subject discussed—Austinian theory of Sovereignty—Analysis of the ideas of law, command, duty, sanction, and a comparative estimate of the same according to the Mīmāṁsaka and the modern schools of jurisprudence —Artha Bhāvanā and Śabda Bhāvanā in commands—A resume of the discussion of the relative weight of customary law and the written law 132

FIFTH LECTURE

INTERPRETATION of the archaic law by the Hindu Commentaries and digests corresponding to the Roman *Responsa Prudentia* and the English case-law—The theory of Ekavākyatva or absolute concord among the several sources of Hindu Law—

PAGE

The Mīmāṁsaka line of argument for adopting this theory—The theory illustrated by the rule of restricted application of different Smṛti codes to different ages and the rule prohibiting certain practices in certain ages—Illustrations of the influence of the theory of Ekavākyatva—(1) Samācāravirodha or conflict with usage as a ground for rejecting a particular construction—applied by Mitākṣarā in construing the texts relating to Uddhāravibhāga and to impartible properties—(2) Meaning of a word or clause altered by the fiction of Ekavākyatva as in the text of Yājñavalkya requiring an Arthin to set out his proof first and that prescribing limitation by adverse possession (3) Modification or extension by Atideśa and the allied conceptions of Ūha and Pratinidhi—Classifications of Atideśa with illustrations for each—(4) Codanāliṅgātideśa or extension by analogy followed out in the principles of Nyāyasāmya, Upalakṣaṇa and Pratinidhi with instances—Fictions of identity between husband and wife, father and son, master and slave, preceptor and disciple, and their influence on the law of inheritance—Limitations to the said fictions recognised by Dharma śāstras—Fiction that a child in the womb is equivalent to a child in existence, and its influence on the law of partition, minority, age of initiation, the law of alienation; limitation to the fiction—Fiction of the duration of human memory in Hindu Law as compared with that in English Law—Its influence upon the construction of the text of Yājñavalkya laying down prescription by adverse possession—Fictions of an heir's spiritual efficacy to offer funeral oblations, of the semi-divine character of a sovereign, of a juristic personality of idols and mutts. . 166

UNIVERSITY OF MADRAS

THE V. KRISHNASWAMY AYYAR LECTURES, 1925

FICTIONS IN THE DEVELOPMENT OF THE HINDU LAW TEXTS

FIRST LECTURE

GENTLEMEN,

Whatever my limitations may be, however insignificant my qualifications may be, the great personality of the late Honourable Mr. V. Krishnaswamy Ayyar has proved to me a source of inspiration; and I make bold to stand before you as the first nominee to the Lectureship instituted in the memory of that eminent lawyer, patriot and scholar by his enlightened and worthy son—Mr. K. Balasubrahmanya Ayyar. With your permission, let me proceed to do the task entrusted to me.

It might be paradoxical to say that fictions are real and permanent, but it is nevertheless a fact. The correctness of the statement will be fully realised by scholars who care to study law historically as well as comparatively. It is a universally recognised fact that the long chain of the innumerable vicissitudes through which law has passed is but the history of one continuous struggle that has raged from time immemorial between law and progress. Law is conservative, has been so from the earliest known period in the history of mankind, and is bound by its very nature to be so; and every modification of law is but the outcome of a necessity to harmonise it with civilisation which is ever in advance of law. If we merely turn our attention to the different stages in the evolution of law, the fact becomes apparent that one later stage is the inevitable result of a conflict of law and civilisation belonging to an earlier stage, and that the change of law merely represents its growth, as of an organic being, which came into existence in response to a national demand requiring law to keep pace with civilisation.

Of the various influences that have been at work in moulding the law of a particular nation, the earliest that is to be met with in the history of jurisprudence is that exercised by fictions. Some nations have been keeping themselves steadfast to fictions which were once invented as a matter of

necessity. Certain fictions have got a much firmer grip over the national mind than others so that they have actually become part and parcel of the national faith and an indispensable canon of religion. With some nations, fictions have ceased to be after having served their purpose; with others, they are living realities down to the present day. The difference in degree of the influence exercised by fictions upon the laws of different nations is largely due to the difference in character of the respective laws and in the foresight with which fictions were invented in different nations. On comparing the history of legal fictions in the Indian law with that in the Western jurisprudence so far as can be gathered from a study of the Roman and English laws, one is likely to appreciate clearly the difference in the influence commanded by fictions in projecting the lines on which law has proceeded in different nations. While in India, fictions have stamped a permanent impress upon the system of law, in the West fictions have been discarded after they cease to be of any use as soon as they come to be superseded by legislation. This permanent character of Hindu fictions and their enduring effect in evolving law from its crude beginnings so as to satisfy the needs of any possible stage in the history of the Indian nation are due to the wonderful intuition of our ancient sages who had left behind them a wealthy heritage of wholesome fictions permanently engrafted upon

the religion of the soil. The dexterity with which legal fictions have been invented and assimilated as an indispensable part of the religion of the people accounts to a large degree for the continuance of fictions as an integral part of the Hindu Law. The permanent character of the influence of fictions over the national mind of India is strikingly brought home to our minds by the fact that even in this advanced age, persons are not lacking who, despite the western education, are as ardent believers in the eternity, infallibility and the omniscience of the Vedas as any person trained in the old school of thought and steeped in the traditions of hoary antiquity. The process by which the Smṛti which really represents the formation of law in a more advanced stage of society is obliged for its authority to trace its descent from the Vedas, and the fiction by which S'iṣṭācāra or approved custom is read into the lines of the Vedas speak volumes in favour of the ever accommodating nature of the Hindu Law as a result of fictions. The rigidity with which the fiction is maintained that Veda is the only authority on matters of law, religion and morality, nay in every conceivable department of learning, which seems at the outset to be an insurmountable barrier for the spontaneous growth of law will, on a closer study, disclose the very reason by which the Hindu Law has been rendered flexible and ever progressive. But for the theory that a custom once established and well

recognised by the community at large must somehow find a place in some nook and corner of the voluminous mass of Vedic literature, the flexibility and the ease with which law is wielded to uphold the validity of modern legal ideas which are the necessary outcome of the progress of the Indian society and culture would have been a factor entirely foreign to the Hindu system of jurisprudence. In no other system of law has the fiction of emanation of later law from some original source been so rigidly kept up as in the law of the Hindus. At the same time our ancients were quite alive to the genuine character of this fiction, for, such an advanced philosopher like S'aṅkara while recognising the supreme authority of the Vedas in matters which are not the monopoly of the select few for whom the Ātman or the Self is the only reality, did not hesitate to include the Vedas within the world of unreality. It will therefore be seen that the paradox with which I started that fictions are real and permanent is specially true in the case of Hindu Law, where they are not discarded after they have served the needs of the society, and consequently, the part played by them is not of a fleeting character as in the laws of other nations. To a Hindu, fictions are living realities down to the present day, but our ancient law-givers were themselves keenly alive to the fact that they were fictions, that they cannot by any stretch of imagination be considered to represent the actual truth, and that

nevertheless they ought to be made use of to the best advantage in overcoming the rigidity of law.

Now the subject I have the privilege to address you upon is the influence exercised by legal fictions in the development of the Hindu Text-Law. The subject no doubt represents a particular aspect of the Hindu legal history, and in a regular history of Hindu Law this will represent but a fragmentary portion and one of the many departments into which it can be divided. It is a pity that up to this time no work has been produced dealing with Hindu law from a historical point of view, and I hope that this—my present series of lectures will be a small beginning for the further and more arduous task of constructing an exhaustive history of the Hindu Law in all its aspects. Before actually entering into the subject, it is necessary for me to place before you the various significations ascribed by different jurists to the term 'legal fictions', and to describe the different processes by which fictions in the different senses of the term exercised their influence in the formation of the jurisprudence of certain typical nations of the West like the Romans and the English. In that wonderful book of Sir Henry Maine on Ancient Law, we find some space allotted to the treatment of fictions as one of the formative influences at work in the development of law. He makes a general proposition that law has developed by the instrumentality of three agencies

by which law is brought into harmony with society, namely, legal fictions, equity and legislation. Sometimes one of them is at work, sometimes two of them, and sometimes all the three. But, broadly speaking, the historical order of their operation is that in which they have been mentioned here. He also says that certain systems of law have entirely escaped the influence of one or the other of them, but it is not clear which particular system of law he has in view while making this assertion. Judging from the available materials, the only possible conclusion is that no system of jurisprudence can be said to have completely remained outside the sphere of operation of any of the three instrumentalities. A fiction being by its very nature the easiest remedy to get over the rigidity and backwardness of law has been freely resorted to by the jurists of all nations for the purpose of effecting improvements upon the original law. With regard to legislation, it is a well known fact borne out by the histories of the different nations that their laws have been considerably affected by its instrumentality. The same may also be said of equity as a potent factor in the progress of law unless the term equity is sought to be restricted to the peculiar branches of law developed in the courts of the English Chancery and of the Roman Praetor.

If we first turn our attention to the history of legal fictions in the Old Roman and English laws

and compare the same with that in the Hindu Law, what strikes us most as the peculiar feature of the last system of law as distinguished from the two others is the singular lack of fictions in the limited signification of the term. On a close study of the Roman and the English Laws it is easily perceived that the two branches of law deeply affected by the influence of legal fictions in the limited sense as understood by an ordinary lawyer relate to procedure and the jurisdiction of courts. Fictions were chiefly invented for the purpose of eluding the then existing rules and laws of procedure and of usurping jurisdiction under both the western systems of jurisprudence under consideration. Bentham defines a legal fiction strictly as " a wilful falsehood having for its object the stealing legislative power by and for hands which could not or durst not openly claim it—and but for the delusion thus produced could not exercise it ". It has been more liberally described by Sir Henry Maine as signifying any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration—its letter remaining unchanged, its operation being modified.

On a comparative study of the different systems of jurisprudence the world has witnessed, both ancient and modern, Eastern and Western, it will be clear that the part played by fictions in the development of law can never be over-estimated; but it

is equally clear that in no system of law and at no period of time have fictions been avowedly recognised by any jurist as a source of law. In fact the very nature of a fiction, *viz.*, that of being a concealment of fact in order to overcome some technical difficulties of law or to make law suitable to fresh exigencies not originally anticipated, effectively prevents its being accorded open recognition as a source of law. I propose to illustrate this proposition by a reference to the authorities recognised as the sources of law in the Hindu system. The text of Yājñavalkya enumerating the different branches of learning and of law runs as follows:

[1] पुराणन्यायमीमांसाधर्मशास्त्राङ्गमिश्रिताः ।
वेदाः स्थानानि विद्यानां धर्मस्य च चतुर्दश ॥

Vedas supplemented by history, philosophy, exegesis, law and the Vedāṅgas are the fourteen branches of learning and of law.

According to Mitākṣarā, the word *Purāṇa* or history occurring in the above verse includes the Brāhma Purāṇa and others, *Nyāya* is equivalent to Tarka Vidyā, *Mīmāṁsā* denotes the interpretation of Vedic texts, and *Aṅgas* refer to the six sciences known as *S'ikṣā* or Phonetics, *Vyākaraṇa* or Grammar, *Chandas* or Prosody, *Nirukta* or Etymology, *Jyotiṣa* or astronomy and *Kalpa* or a manual of Vedic

[1] *Yājñavalkya*, Ācārādhyāya, Chapter 1, Verse 3.

rites. According to a different category, four additional branches of learning are referred to, making in all eighteen—*Āyurveda* or medicine, *Dhanurveda* or archery, *Gāndharva* or music and *Artha-s'āstra* or polity. The word, *Dharmas'āstra*, appearing in the text of Yājñavalkya has been explained by the author himself by the following two verses:

[1] मन्वत्रिविष्णुहारीतयाज्ञवल्क्योशनोऽङ्गिराः ।
यमापस्तम्बसंवर्ताः कात्यायनबृहस्पती ॥
पराशरव्यासशङ्खलिखिता दक्षगौतमौ ।
शातातपो वसिष्ठश्च धर्मशास्त्रप्रयोजकाः ॥

The founders of Dharmas'āstra are—Manu, Atri, Viṣṇu, Hārīta, Yājñavalkya, Us'anas, Aṅgiras, Yama, Āpastamba, Saṁvarta, Kātyāyana, Bṛhaspati, Parās'ara, Vyāsa, S'aṅkha, Likhita, Dakṣa, Gautama, S'ātātapa and Vasiṣṭha.

Mitākṣarā declares that the above enumeration is not restrictive, but only illustrative of the authentic Smṛtis, so that works like that of Bodhāyana and others must also be deemed to come within the definition of Dharmas'āstra. As regards the special sources of law, the following text of Yājñavalkya gives an exhaustive list:

[2] श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
सम्यक्संकल्पजः कामः धर्ममूलमिदं स्मृतम् ॥

[1] *Yājñavalkya*, Ācārādhyāya, Chapter 1, Verses 4 and 5.
[2] *Ibid.*, Verse 7.

Revelation, Remembrance, Valid custom, the satisfaction of one's own conscience and the desire born of pious motives—are (collectively) the source of Dharma.

The above provisions of Hindu law and the corresponding provisions of the Roman and English laws relating to the sources of law with which I do not propose to deal in detail will sufficiently bear out the statement that fictions as such have never been avowedly recognised as a source of law in any system of jurisprudence.

Although the lists given by the ancient authors refer to fourteen or eighteen general branches of learning and five special sources of law, in theory the Veda is the ultimate and exclusive source of all knowledge and law. On a careful scrutiny, this theory will be seen to represent the actual truth from a historical point of view to a limited extent. A student of comparative jurisprudence can hardly fail to be convinced of the universality of this theory. The three systems of jurisprudence known to us: the Roman, the English and the Hindu Laws unanimously declare that their later laws are embodied in their entirety in their respective ultimate sources, *viz.*, The Law of the Twelve Tables, The Common law and the Vedas. Although in theory the several ultimate sources furnish a complete code of law applicable for all time to come, the fiction itself indicates the

indisputable historical truth that they only serve as a foundation on which the entire superstructure of later law rests. In other words, the modern law is merely another form of the archaic law improved upon, modified or restricted according to the exigencies of later civilisation.

In determining the exact consequence of the employment of fictions in the development of forensic lore, a study of the fictions in the Roman and English laws and the part played by them in the development of those laws is bound to throw considerable light upon the lines we are to pursue within the province of the Hindu law. The reason why jurists have frequent recourse to the employment of fictions is the signal service rendered by them in the matter of transforming the law without fear of detection. Like individuals, nations have got peculiar idiosyncracies and long-cherished traditions with which they are loath to part. Accordingly the Roman citizen of old and a Hindu of the Vedic age could not think of deviating a jot from the spirit of the Law of the Twelve Tables and the Vedas respectively, but with the advance of political and social progress the archaic law of the Vedas came to be of little use in its practical application to an Indian of the Post-Vedic age as the Law of the Twelve Tables to the latter day Roman. At this stage the genius of the Hindu jurist comes into play, who within the letter of the Vedic text readily finds

a warrant for a piece of legislation wide apart from the spirit of the Vedas, and the same meets with a ready acceptance of the nation at large whose mentality itself is changed from one of faithful clinging to the spirit of the Vedic law to one of a time-serving subservience to its letter. While the conservative spirit of the public to preserve in tact their individuality as a nation is satisfied by the adoption of this device, it equally satisfies the more intelligent desire for improvement and adaptation of the original law to progressive conditions. Law is thus brought into harmony with the society by the employment of fictions. As this is the principal office discharged by fictions, it naturally follows that the employment of fictions will be the most favoured contrivance of the jurist at a time when he dare not legislate openly. It is the easiest solution for evolving a law suited to new conditions while the law is in the process of formation. In the legal history of every nation, fictions as a factor in the development of law belong to the earliest stage at which a transformation of law takes place. It takes precedence in point of time to all other contrivances employed by a jurist. At the same time we have to bear in mind that even the present age has not yet been completely liberated from the fetters of fictions. Even the modern law is obliged to tolerate a number of false assumptions of fact, as may be evident from the law relating to presumptions or burden of

proof. Is there any doubt that in most cases the presumption may not accord with reality? Can it be contended with certainty that unless the onus of proof is discharged by a particular person the fact is against him? Nevertheless, this rule is resorted to as a matter of convenience in order to avoid prolongation of litigation for want of positive evidence. It is also based on the rationale that a person who is not diligent enough to prove his case must suffer the consequences of his inadvertence. To illustrate fictions prevalent in the modern law, the following legal ideas may be referred to with advantage—*constructive possession* by which a person not in possession is supposed to be in possession; *constructive fraud* by means of which a fraudulent intention is presumed under circumstances free of actual fraud between persons standing in a particular relation to each other as guardian and ward, solicitor and client, etc.; *constructive trust* by means of which a trusteeship is presumed by the operation of law under circumstances negativing the existence of an actual trust; *constructive Res Judicata* whereby a point which has not been actually decided upon, is treated as having been the subject-matter of adjudication on the ground that the point ought to have been raised in the previous litigation. It is easy to multiply examples of this nature, but it is sufficient to lay down in general that all constructive legal ideas recognised in the modern law represent

a phase of the influence exercised by fictions which have maintained their ground down to the present day by reason of their utility. In this connection, it may be worth while to cite the observations of Sir Frederick Pollock in his notes on the English case-law and fiction, appended to the chapter on 'Legal fictions' in Maine's Ancient Law. He says:

"Perhaps Maine's exposition hardly brings out the prevailing motive for introducing fictions—the desire of obtaining a speedier or more complete remedy than the strictly appropriate form of procedure affords. Among the regular though not invariable marks of fiction in modern English law is the use of the word 'constructive' or the word 'implied' as any careful student may note for himself. It would be rash to suppose that the age of legal fictions is wholly past. When ancient law was written, one example was quite recent in our courts, the rule that a man who professes to contract as an agent is deemed to warrant that he has authority from his alleged principal. This is a fiction, but beneficent and elegant, and it is now fully accepted."

I have already referred to the fact that fictions are usually to be found in that stage of the law where it is in the process of formation. Generally they cease to be after legislation. When the Roman Law was settled and declared by the Institutes of Justinian, fictions had already become a matter of past history. The fictions belonging exclusively to

the English law of Real Property completely disappeared when the law came to be declared in the various enactments such as 'The Settled Land Act,' 'The Land Transfer Act,' etc. The fiction prevalent in the King's Bench that the plaintiff was in the custody of the King's Marshal, and the fiction in the Exchequer that the plaintiff was the King's debtor were put an end to by The Uniformity of Process Act 2, William IV, ch. 39, which also abolished the writ of *latitat.* The common law court fictions of pleading in *Trover* and *Detinue* were done away with by The Common Law Procedure Act of 1852. The fiction of a lease in actions by a freeholder was abolished by an enactment of 1857.

The two different branches over which fictions are seen to have exercised their influence as far as the Roman and English laws are concerned, relate to the laws of procedure and jurisdiction. The importance of fictions as a factor in the development of early Roman Law will best be recognised from the fact that the substantive law of Rome is evolved in its entirety from the law of procedure, with which alone the Law of the Twelve Tables concerned itself. There is absolutely no mention of the substantive law in the Twelve Tables, and whatever light could be had of the substantive rights and obligations of parties can only be gathered from the processual remedies prescribed by the Twelve Tables. If a distinct

procedure is laid down for the enforcement of a right or obligation, for the punishment of a delict or crime, it was inferred that there was a corresponding right or obligation, and that a particular act amounted to a civil wrong or a crime. It was by this process, that the law was developed from a crude system prescribing certain set forms of action to an all comprehensive system including within its range, one of the most highly developed substantive laws.

In the Roman law, *fictio* is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse. I shall now attempt to give a few illustrations of the influence of legal fictions on the law of procedure and their indirect influence in the formation of the substantive law in both the English and Roman laws. The old Roman law of procedure allowed no redress to persons who were not Roman citizens. But when Rome expanded, acquired dominions abroad, and came into contact with different peoples, redress to a non-citizen became a matter of necessity, but his ineligibility to seek redress in a Roman court was overcome by the adoption of a fiction whereby he was allowed to aver that he was a Roman citizen, and the same was not allowed to be agitated by the other side by proof of his being a foreigner. Instances of the influence of legal fictions on the development of adjective law

may be cited from the ancient procedure in the actions of *Trover* and *Detinue* known to the English Common Law. *Trover* was a form of trespass on the case, and was based on a fiction that the defendant had found the goods and afterwards converted them to his own use. *Detinue* was formerly considered as an action *ex contractu*, but later it came to be recognised as an action founded on 'Tort' on the assumption of a fiction of a supposed bailment where none such had actually taken place. The fictitious allegations of loss and finding in an action on *Trover*, and of bailment in actions for goods and their value were finally done away with by the Common Law Procedure Act of 1852, which substituted an allegation that the defendant converted to his own use or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods. Another curious instance of a legal fiction in the ancient English Law of Procedure is to be met with in connection with an action in ejectment. Ejectment was originally the proper remedy for the recovery of possession available to a leaseholder. Later on, it came to be a remedy recognised as a form of action in which the title to a freehold was allowed to be agitated by the adoption of a fictitious lease in favour of an imaginary plaintiff. Whenever a freeholder resorted to this form of action for the recovery of land, he was permitted to make a false declaration whereby he alleged a lease to an

imaginary plaintiff called John Doe and an entry and remainder in possession by him under such lease until he was ejected by an imaginary defendant Richard Roe.

Another interesting feature in the development of law by legal fictions is illustrated by the process by which courts which originally had no jurisdiction over certain classes of persons or of causes, contrived to obtain jurisdiction over them by means of fictions. For example, the courts of King's Bench and Exchequer originally had no jurisdiction over purely civil causes. But they gradually contrived to obtain control over personal actions. This result was brought about in the King's Bench by allowing the plaintiff to falsely allege that the defendant was in the custody of the King's Marshal for a breach of the peace, and when the defendant was thus brought within the jurisdiction of the court on a criminal charge, he was thereafter prevented from disputing the genuineness of the allegation, and the plaintiff was thus enabled to proceed against him even in matters of a purely civil nature. The far-reaching consequences of the employment of fictions in the matter of usurpation of jurisdiction by one court at the expense of another will best be noticed in connection with the form of writ known as *latitat* issued by the King's Bench. *Latitat* was a form of writ by which defendants in personal actions were originally summoned to answer in the

King's Bench. In order to acquire jurisdiction in personal actions it was usual for the King's Bench to issue what is known as a *Bill of Middlesex* directed to the sheriff of that county. The said *Bill of Middlesex* directed the sheriff to arrest any person on a false charge of trespass, and to bring him within the jurisdiction of the court of the King's Bench. If the defendant lived within the county of Middlesex, no further steps were necessary to bring him within the jurisdiction of the King's Bench. But if he lived outside the county of Middlesex, on the return of *Non-est-inventus* endorsed on the *Bill of Middlesex* by the sheriff, the King's Bench issued a writ of *latitat* addressed to the sheriff of such other county within whose limits the defendant resided, which recited the *Bill of Middlesex* and the return of the sheriff and the attestation to the court that the defendant lurks and runs about such other county, and commanded the sheriff of the latter county to take him and safely keep him so that he might have his body in court on the day of the return of the writ. Thus it will be seen that the writ of *latitat* involves a greater degree of fiction than the *Bill of Middlesex*. While the *Bill of Middlesex* rest content with enabling the King's Bench to acquire jurisdiction over purely civil causes as between the residents in the county of Middlesex, the writ of *latitat* enabled the King's Bench to extend its jurisdiction not merely with

reference to the causes to be heard, but also to assume a larger territorial jurisdiction than it could do. While the *Bill of Middlesex* was based on the mere fiction that the defendant was liable to be arrested by the King's Marshal for a breach of the peace or for a criminal trespass, the writ of *latitat* assumed another fiction that the defendant was wantonly keeping himself out of the territorial limits of Middlesex. In a later stage of the law relating to the jurisdiction of the King's Bench, a triple fiction was adopted, namely, that the defendant was in the first place liable to be arrested for a criminal wrong; secondly, that he purposely evaded service by absconding; thirdly, that a *Bill of Middlesex* was issued, that the sheriff returned *Non-est-inventus*, and that therefore he was liable to be summoned by means of a writ of *latitat*. The three different stages in the development of the writ of *latitat* strongly illustrate what wonderful changes are wrought by fictions in the legal history. At the earliest stage when a single fiction was resorted to, civil causes fell within the purview of the King's Bench; at the second stage, persons residing outside the local limits of its jurisdiction came indirectly to be subject to its jurisdiction; at the third stage, the summons issued by the King's Bench acquired the rank of a first process even in the case of residents abroad and in all civil causes. There are also instances in which the court of

Exchequer expanded its jurisdiction by the employment of other legal fictions of a similar nature. Originally the Court of Exchequer confined itself to the adjudication of disputes relating to debts due to the King. Nevertheless it acquired a wider jurisdiction by allowing the plaintiff to falsely represent himself as a debtor to the King and state that by reason of the wrongful act or default of the defendant he was the less able to pay his debts.

Instances of the modification or expansion of law by means of legal fictions may be drawn from the history of the early Roman law of Property. In all archaic societies, inalienability of property was the rule, and alienation represented the exception. But ancient law recognised certain devices to remove the impediments standing in the way of free alienation, although the inroads in that direction were applied very cautiously and confined strictly within certain well-defined limitations. At first, alienation was recognised only of certain classes of property, and must be invariably accompanied by a multitude of formalities, not one of which could be dispensed with. The distinction between *Res Mancipi* and *Res Nec Mancipi* illustrates the struggle which the law of alienation had to fight from its earliest stages. In order to effectuate a free alienation of land and certain allied subjects of property known as coming within the definition of *Res Mancipi*, the fictitious procedure of *Mancipatio* and that of

In Jure Cessio were resorted to. *Mancipatio*, under the Roman Law, was the term applied to the mode of alienating *Res Mancipi* which included land and rustic servitudes in Italy, slaves, domestic beasts of burden, free persons in *Potestas*, *Manus* or *Mancipium*, and under certain circumstances a man's whole property in the aggregate. It denotes a form of sale in which the purchaser took hold of the thing purchased with his hand, and claiming it to be his, struck a pair of scales with a piece of copper which he then tendered to the seller. The transfer by *Mancipation* must be effected in the presence of not less than five witnesses who must be Roman citizens of the age of puberty and also in the presence of another person of the same condition who holds a pair of scales and hence is called a *Librepens*. The other mode of transferring *Res Mancipi* known as *In Jure Cessio* was a form of a voluntary transfer effected under magisterial authority through the fiction of a suit at law as in the English *Fines and Recoveries*.

A survey of the history of the right of alienation in Roman Law from the earliest stage when certain select classes of property could alone be alienated and that too by the adoption of certain prescribed fictitious proceedings, to the highly developed stage at which most classes of property passed by mere *tradition* or delivery, will, when compared with the Hindu Law of Property, present

a striking contrast between the different lines in which the Hindu and Roman Laws have proceeded through the different steps in the progress of the right of alienation. But there is one common factor in the histories of the Law of alienation under the Roman and Hindu systems, that is, both these systems of law have evolved and developed themselves by means of fictions. While in the Roman Law, the first inroad upon the inalienability of property was made in favour of sale or alienation for consideration, and the other transfers such as gift, exchange, etc., were modelled as a later innovation derived from the law of sale by keeping up the fiction of a sale even in voluntary transfers, the Hindu law on the other hand starts from making an inroad upon the inalienability of property in favour of a free and voluntary gift, and the later laws of sale, exchange, etc., were merely modelled upon the law of gifts. In other words, in the Hindu system, the law of gifts was the original of which the laws of sale, exchange, etc., were later products; in the Roman system, the law of sales was the model on which were drafted the laws of gifts, exchange, etc. Both the Hindu and Roman systems are very particular in the observance of the requisite formalities prescribed by the ancient law. As in the Roman law, so also in the Hindu law do we meet with certain well-defined rules of procedure prescribed in the matter of alienation. Corresponding to the

distinction between *Res Mancipi* and *Res Nec Mancipi* of the Roman law, a distinction between two sets of properties is to be met with in Hindu Law, which required the observance of different formalities, and were regulated by totally different rules in the matter of alienation, as is clearly borne out by the following texts cited in the Mitākṣarā:

[1] स्थावरं द्विपदं चैव यद्यपि स्वयमर्जितम् ।
असंभूय सुतान् सर्वान् न दानं न च विक्रयः ॥
ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः ।
वृत्तिं च तेऽभिकांक्षन्ति न दानं न च विक्रयः ॥

Land and bipeds, although self-acquired can neither be given nor sold without convening all the sons. Those that are born, those that are unborn, and those that remain in the womb require the means of living. There is therefore neither a gift nor a sale.

The above texts clearly indicate that the incidents of immovable property attached to certain other kinds of property as well, and that both of them formed a separate class in respect of which the father or the head of the family was denied the exercise of a free right of alienation, whereas, in the case of movable properties a larger right of alienation is recognised as appears from the following text:

[1] *Mitākṣarā Vyavahārādhyāya Dāyavibhāga Prakaraṇa*, Introductory.

[1] मणिमुक्ताप्रवालानां सर्वस्यैव पिता प्रभुः ।
स्थावरस्य तु सर्वस्य न पिता न पितामहः ॥

The father is the master of gems, pearls and corals, and of everything (movable). But neither the father nor the grandfather is the master of the entire immovable property.

With regard to the formalities necessary for the completion of a transfer of immovable property, there is a text cited in the Mitākṣarā which refers to six modes of transfer:

[1] स्वग्रामज्ञातिसामन्तदायादानुमतेन च ।
हिरण्योदकदानेन षड्भिर्गच्छति मेदिनी ॥

By the assent of townsmen, of agnates, of the king and of coparceners, and by the gift of gold and water—by these six means, land passes.

The law as laid down in this text refers to the earliest period in the history of the law of property. As time went on, certain of these formalities, it appears, were dispensed with, and the law accordingly underwent a modification; and it is only the law thus developed in the later stage that is laid down in the Mitākṣarā in the following passage:

[1] ग्रामानुमतिः व्यवहारप्रकाशनार्थमेवापेक्ष्यते ।
न पुनर्ग्रामानुमत्या विना व्यवहारासिद्धिः ।
सामन्तानुमतिस्तु सीमाविप्रतिपत्तिनिरासाय ॥

[1] *Mitākṣarā Vyavahārādhyāya Dāyavibhāga Prakaraṇa*, Introductory.

The consent of the villagers is required to give publicity to the transaction and not that the transaction is incomplete without the villagers' consent. The assent of the sovereign is to avoid boundary disputes.

There is a good deal of anomaly in the interpretation adopted by Mitākṣarā of the text prescribing the six formalities to be observed in the transfer of immovable property. In the case of the assent of kinsmen, of villagers and of the sovereign, the author says, it is simply to give publicity to the transaction and to avoid future disputes. With regard to the consent of kinsmen and heirs, he says that it is of the very essence of alienation, and that except under legal necessity, a sale is impossible of immovable property. With regard to the formality of gift of gold and water, he says that it is essential to constitute an alienation of immovable property and a valid transaction in the eye of the law. The reason of keeping up the fiction of a gift is laid down by the Mitākṣarā in unmistakable terms in the following passage :

[1] हिरण्योदकदानेनेति ॥ 'स्थावरे विक्रयो नास्ति कुर्यादाधिमनुज्ञया ।' इति स्थावरस्य विक्रयप्रतिषेधात्, 'भूमिं यः प्रतिगृह्णाति यश्च भूमिं प्रयच्छति । उभौ तौ पुण्यकर्माणौ नियतौ

[1] *Mitākṣarā Vyavahārādhyāya Dāyavibhāgaprakaraṇa*, Introductory.

स्वर्गगामिनौ ॥' इति दानप्रशंसादर्शनाच्च विक्रयेऽपि कर्तव्ये, सहिरण्यमुदकं दत्वा दानरूपेण स्थावरविक्रयं कुर्यादित्यर्थः ॥

The meaning of the phrase 'By gift of gold and water';—since by the text 'Of immovable property there is no sale, but one may hypothecate it with consent—of coparceners' a sale is prohibited of immovable property, and since, by the text 'He who accepts land, and he who gives it are both performers of a sacred act, and are bound to attain heaven' a gift is highly commended, when a sale is to be effected of immovable property, one ought to do it in the form of a gift accompanied by the gift of gold and water.

The above text throws considerable light on the history of the law of property, and indicates three different stages in the development of the right of alienation of immovable property. At the first stage, a free and voluntary gift alone was recognised as valid; at the second stage, a hypothecation came to be recognised in addition to gifts; and at the latest stage, a sale or alienation for valuable consideration makes its appearance.

We have thus far noticed the influence exercised by fictions in the development of the right of alienation so far as immovable property is concerned under both the ancient systems of the Roman and Hindu Laws, and may here with advantage pause for a while to consider the same subject under the

English law of Real Property in order to arrive at a comparative estimate of the different lines on which the law has developed under the different systems. As in all other archaic systems of law, the English law of Real Property started with a bias against alienation of any sort. The distinction between Real Property and Personal Property bears out the theory that in ancient systems of jurisprudence, certain classes of property were assigned a higher rank over others, and that superiority in rank among the properties generally carried with it the character of inalienability. The prohibition against alienation of immovable property in ancient laws proceeded on the assumption that property exists for the benefit of a man and his heirs, so that all transactions that have the effect of disinheriting an heir apparent were looked upon with disfavour by the Common Law. The first inroad upon the Common Law which so jealously guarded the interests of the heirs was made in the case where a freeholder gave away part of his land in remuneration of service. Though the services reserved by the grant might have been originally a proper consideration for the gift, in later times it so happened that the main consideration for an alienation was the payment of a sum of ready money to the grantor as a *fine*, reserving services of little or no value in favour of the grantor's heirs which merely calculated to keep up the appearance of an

acknowledgment of tenancy by the grantee in favour of the grantor and his heirs. Similarly in the case of a grant of an *estate tail*, alienation in fraud of the rights of heirs was strictly prohibited. If we trace the growth of the power of alienating land given to a man and the heirs of his body, at the earliest stage, we see no alienation was possible. Later, the birth of issue was treated as a condition which enabled a tenant in tail to alienate his property with the result that the mere birth of issue gave the donee a complete power of disposition over an estate tail. In the reign of Edward I, a reaction set in, and the famous *Statute De Donis Conditionalibus* was passed whereby it was laid down that the will of the donor should be strictly observed. "[1] When the statute began to operate, the inconvenience of strict entails became sensibly felt. Children, it is said, grew disobedient when they knew they could not be set aside; farmers were deprived of their leases; creditors were defrauded of their debts; and innumerable latent entails were produced to deprive purchasers of their land they had fairly bought; treasons were also encouraged as estates tail were not liable to forfeiture longer than the tenant's life." The judges were at their wits' end to remove the anomalies created by the statute; and this they did by subtle

[1] Williams's *Law of Real Property*, Twenty-second edition, page 94.

processes and by gradual degrees which involved an additional fiction at each successive stage. First, they held that it was sufficient to impart validity to the alienation of an estate tail, provided the tenant in tail left to his heirs sufficient funds that will approximate the value of the lands sold. In the next stage, it was thought sufficient if the tenant in tail had merely obtained a decree in a court of law entitling him to recover from some other person, lands of equal value instead. This afforded another opportunity for the judges to completely subvert the original law of strict entails; for in course of time it was found to be an easiest mode for effectively barring an entail to get some sort of decree against a man of straw. And this principle, at first confined to judgment obtained in a contested action, was allowed to hold good when the judgment was obtained by collusion, and thus a practical abolition of entail resulted.

Just as the Roman law recognised the validity of the fictitious modes of transfer, namely, *Mancipatio* and *In Jure Cessio*, the English law of Real Property recognised certain modes of alienating lands, of which *fines* and *recoveries* are typical illustrations. A *fine* was an agreement of compromise made by leave of court in an action whereby the lands in question were acknowledged to be the right of one of the parties. The action in which the compromise was entered into might be genuine or fictitious, and

it had to be enrolled among the records of the court, and if it was allowed to stand on the rolls without being impeached within a year and a day, all parties having rights thereto were liable to be barred of their rights. A *recovery* was a mode by which land was decreed in favour of a plaintiff in a collusive action brought by him by means of which he was enabled to absolutely transfer lands in respect of which he possessed only an estate tail. The solemn piece of juggling involved in a *Recovery* at Common law is a typical illustration of the influence of fictions in the development of law. I do not propose to deal with the several fictions, by means of which entailed lands came to be freely alienated, as they do not strictly come within my province, except as far as is necessary for a comparative study of the Hindu law.

Thus far I have alluded to certain typical fictions both in the English and Roman laws, and directed your attention to the influence that they exercised in the development of those laws. A recapitulation of them will bring to mind that their influence was mostly confined to the two departments of adjective law, namely, that relating to procedure in court, and that relating to the jurisdiction of courts. In attempting to compare the influence of legal fictions in those systems of law with that in the Hindu Law, it is necessary for us to bear in mind the different significations in which the term 'legal

fiction' is employed. The fictions that I have already referred to, for example, in Roman Law that the plaintiff was a Roman citizen, in English law—that the defendant was in the custody of the King's Marshal, that the plaintiff was the King's debtor and on account of the defendant's default he was the less able to pay the debt due to the king, that the defendant had found the goods and subsequently converted them to his own use, that the plaintiff effected a bailment of the goods with the defendant, etc., are all seen to fall within the purview of the adjective law, and strictly fall within the category of legal fictions as understood by an ordinary lawyer. From this narrow standpoint, it may, with a considerable degree of certainty, be asserted that the Hindu Law has entirely escaped the influence of fictions as a factor in the evolution of legal principles. The reason for the singular lack of fictions in the narrower sense in the Hindu Law is twofold. The abundance of fictions in the Roman Law is mainly due to the fact that there were originally no rules of substantive law. The primitive law of Rome was entirely a code of rules relating to forms of action, and the substantive rights and obligations had to be known only through the forms of action prescribed for the enforcement of rights and obligations. If a particular remedy was provided, a corresponding right or obligation was inferred,

and it was through this inferential process that the highly complicated substantive law of later Rome was drawn out from early sources. It is perhaps this notable fact that weighed with Maine when he observed that procedure in all archaic law was disproportionately large when compared with the law of rights and obligations. This theory of Maine is at all events not true with reference to the Hindu Law during the Smṛti age; in fact, far from being disproportionately large, adjective law occupies much less space in any of our Smṛtis than the substantive law or even the modern law does. In the entire code of Manu consisting of twelve chapters, the only treatment of adjective law is contained in a very small portion of the eighth chapter. In the code of Yājñavalkya consisting on the whole of three big adhyāyas—Ācāra, Vyavahāra and Prāyaścitta, only two small chapters at the beginning of Vyavahārādhyāya are devoted to the treatment of adjective law under the heads of 'general procedure' and 'special procedure,' although positive law covers on the whole the wide range of twenty-five chapters.

Nor can we subscribe to the proposition suggested by Sir Henry Maine, that civil law is largely derived from rules relating to crimes. No doubt the theory that he propounds that in ancient law crimes and sins are treated as convertible terms is seen to accord with our observations of the Hindu

Law. But it in no way follows that rules of civil law were not to be found in the earliest stage of positive law, or that the law of civil rights originatad from the law of crimes. Our Smṛtis deal with contracts and other civil matters with as much minuteness and elaborateness, if not more, as with offences. A study of our Smṛtis rather indicates that the criminal law was a creature of the civil law than the contrary. The soundness of this theory seems to get some support from the fact that in the majority of Smṛtis available to us no separate chapter is devoted to the treatment of criminal law, and the few references to it rather suggest the mixed civil and criminal character of offences. In most of the examples, transgressions of law entail not merely punishment of the offender, but a liability to pay substantial compensation to the injured party. Yājñavalkya refers to defamation, rape, adultery, breach of trust and some other offences most of which come under the meaning of Sāhasa. But there is everywhere the preponderance of the idea of civil injury over that of a public wrong.

Now that it has been pointed out that there has been no necessity under the Hindu Law for the substantive law to evolve itself from out of its meagre beginnings in the adjective law, the prime reason for the invention of fictions disappears. The other motive which necessitated the invention of fictions, namely, that of usurpation by courts of the jurisdiction

of each other can by its very nature operate when there are two or more sets of courts, each exercising a peculiar jurisdiction of its own. This can happen only when there are certain well-defined limits of the jurisdiction of the different courts, for then alone does the necessity arise for a contrivance on the part of one to oust the jurisdiction of the other. It is this motive that accounts for the innumerable fictions in which the English law abounds until they were finally dispensed with by legislation. In the light of this observation it becomes necessary for us to examine the constitution of the ancient Hindu judiciary, and to see whether the prevailing motive of courts to oust the jurisdiction of each other could ever have been possible under the Hindu Law. Of course it will not without further research be possible to arrive at a correct estimate of the constitution of judicial tribunals in the Vedic age. I shall therefore now confine my attention to the scanty materials available in the Smṛti literature out of which it is possible to construct a theory about the constitution of courts in ancient India. The first idea that strikes me is the existence of royal and popular courts side by side. This, I think, follows from the following text of Yājñavalkya :

[1] नृपेणाधिकृताः पूगाः श्रेणयोऽथ कुलानि च ।
पूर्वं पूर्वं गुरु ज्ञेयं व्यवहारविधौ नृणाम् ॥

[1] *Yājñavalkya Vyavahārādhyāya*, Chapter 2, Verse 30.

Of the King's officers, principalities, profession-guilds, and families—each prior is superior to others in the matter of disposal of litigation among men.

This text mentions four different tribunals engaged in the administration of justice. The first is the King or his deputy who in later times came to be known as Prāḍvivāka. The absence of the express mention of the word Prāḍvivāka in the code of Yājñavalkya seems to suggest that the tenure of Prāḍvivāka meaning a judge or a magistrate deriving his authority from appointment by the Sovereign is a creature of later origin, and that a Prāḍvivāka as the King's deputy is the result of a compromise between two independent courts which were originally represented on the one hand by the King and on the other by a learned Brahmin. Each of the early Hindu states seems to have had a learned Brahmin who exercised a jurisdiction equal to and co-ordinate with that of the King. This is the only conclusion that can be drawn from the code of Gautama which relates to a period anterior to that of Yājñavalkya:

[1] द्वौ लोके धृतव्रतौ राजा ब्राह्मणश्च बहुश्रुतः ।

The two solemnly engage themselves in administering justice—the King and a Brahmin of vast erudition.

The words *Dvāu* and *Ca* in the above text will be inconsistent if either the King or the Brahmin is

[1] *Gautama*, Chapter 8, Sūtra 1.

derived from the other. The cardinal numeral 'two' and the conjunctive participle 'and' can only be explained on the basis that both the nouns occurring in the text are of equal prominence. It therefore follows that the learned Brahmin referred to in Gautama's text represents a distinct tenure of office exercising concurrent jurisdiction with the King. But later when the inconvenience of the co-existence of two different courts without well-defined limitations of jurisdiction became sensibly felt, the conflict between the royal and ecclesiastical courts was set at rest by adopting a conciliatory attitude by means of which the decrees of the learned Brahmin were accorded full recognition by the Sovereign which ultimately led to the assumption falsified by history that the authority of the learned Brahmin was derivative and carved out of the judicial functions of the Sovereign. Of the four classes of courts mentioned by Yājñavalkya, the first is the Royal court which consists of the King's councillors. The second class consists of *Pūgas* which are defined by Mitākṣarā as assemblies of the residents of the same locality, but of different castes and callings as a village, a town, etc.

[1] पूगा: समूहा: भिन्नजातीनां भिन्नवृत्तीनां एकस्थान-निवासिनां यथा ग्रामनगरादय: ॥

The next group consists of *S'reṇis* or assemblies of different castes, but of members exercising

[1] *Mitākṣarā Vyavahārādhyāya*, Chapter 2, Verse 30.

the same sort of profession as of horse-dealers, betel-vendors, weavers, shoe-makers, etc.

[1] श्रेणयो नानाजातीनां एकजातीयकर्मोपजीविनां सङ्घाताः यथा हेडाबुकादीनां ताम्बूलिककुविन्दचर्मकारादीनां च ॥

The last class of courts are *Kulas* or assemblies of agnates, kinsmen and cognates.

[1] कुलानि ज्ञातिसम्बन्धिबन्धूनां समूहाः ।

The existence of the different bodies of laws administered by the different tribunals is recognised also by Manu who says :

[2] जातिजानपदान् धर्मान् श्रेणीधर्मांश्च धर्मवित् ।
समीक्ष्य कुलधर्मांश्च स्वधर्मं प्रतिपालयेत् ॥

A king shall enforce his law in consultation with the rules of castes and localities, the rules of trade-unions, and the rules of families.

This suggests the concurrent growth of different rules of law obtaining in different courts which ultimately emerged as regular codes of law. The following texts of Gautama also point to the same conclusion :

[3] देशजातिकुलधर्माश्चाम्नायैरविरुद्धाः प्रमाणम् ॥

Conventions of localities, castes and families are authoritative, provided they do not conflict with the Vedas.

[1] *Mitākṣarā Vyavahārādhyāya*, Chapter 2, Verse 30.
[2] *Manu*, Chapter 8, Verse 41.
[3] *Gautama*, Chapter 11, Sūtra 22.

[1] कर्षकवणिक्पशुपालकुसीदिकारवः स्वे स्वे वर्गे ।

Agriculturers, merchants, shepherds, money-lenders, blacksmiths, etc., are authorities within their fold.

On a comparison of the texts relating to the rules of law and the constitution of courts in the codes of Gautama, Manu and Yājñavalkya, we see that both Gautama and Manu refer only to different sets of rules, but not to different tribunals while Yājñavalkya expressly refers to both. This indicates that a body of rules was gradually growing independently of the royal courts, that those rules were feebly recognised at first, later on they were suffered to stand undisturbed, that at last they came to be actually enforced by the might of political authority, and that in order to assume the dignity of judicial tribunals, the popular courts had to fight their way strenuously. When from out of their humble beginnings the popular courts emerged as judicial tribunals, it naturally became necessary to define the jurisdiction of the King's court and the popular courts. Accordingly we meet with rules to the effect that one court is superior to another court, that one exercises original jurisdiction in certain matters, while others exercise appellate jurisdiction therein and so on as has been beautifully summarised in the second half of Yājñavalkya's verse referred

[1] *Gautama*, Chapter 11, Sūtra 23.

to already, whose gist is thus clearly set out in the following passage of Mitākṣarā :

[1] एतदुक्तं भवति । नृपाधिकृतैर्निर्णीते व्यवहारे पराजितस्य यद्यप्यसन्तोषः कुदृष्टिबुद्ध्या भवति तथापि न पूगादिषु पुनर्व्यवहारो भवति । एवं पूगनिर्णीतेऽपि न श्रेण्यादिगमनम् । तथा श्रेणिनिर्णीते कुलगमनं न भवति । कुलनिर्णीते तु श्रेण्यादिगमनं भवति । श्रेणी-निर्णीते पूगादिगमनं पूगनिर्णीते नृपाधिकृतगमनं भवतीति ॥

This is the purport. In a cause decided by the King's officers, although the defeated party is dissatisfied and thinks the decision to be based on misappreciation, the case cannot be carried again to a *Pūga* or the other tribunals. Similarly in a cause decided by a *Pūga* there is no resort to *S'reṇi* or *Kula*. In the same way, in a cause decided by a *S'reṇi* no recourse is possible to a *Kula*. On the other hand, in a cause decided by a *Kula*, S'reṇi and other tribunals can be resorted to. In a cause decided by *S'reṇi*, *Pūga* and the other tribunal can be resorted to. And, in a cause decided by *Pūga*, the royal court can be resorted to.

The above quotation from the Mitākṣarā throws sufficient light to enable us to trace the history of the ancient Indian Judiciary. There was the King's court on the one hand possessing original and appellate jurisdiction in all causes. On the other hand, there are three popular courts

[1] *Mitākṣarā Vyavahārādhyāya*, Chapter 2, Verse 30.

possessing an inferior and limited jurisdiction with certain limitations. *Pūga* or the municipal court exercised original jurisdiction over causes arising as between inhabitants of the same locality irrespective of the professions to which the parties belonged, and it exercised appellate jurisdiction over causes decided by trade unions and domestic tribunals, and was in its turn subject to the appellate jurisdiction of the royal court which was the ultimate appellate authority in the land. Next to the *Pūga* comes the *S'reṇi* or the trade union whose jurisdiction was still more circumscribed as being confined to causes arising as between members of the same profession in respect of which it was a court of first instance, being subject to revision by the two higher courts namely *Pūga*, and the King. Besides, it also served as a court of appeal with reference to causes tried by the family tribunal or *Kula* which was the lowest in rank among the popular tribunals, and purely consisted of kinsmen. The Royal court would naturally be located in the capital of the kingdom, but Nārada who is a later author introduces a distinction between a court presided over by the King's officers and the King himself, for he says: [1]'In a cause decided by the King's officers an appeal lies to the King.' This indicates that by the time of Nārada the royal court multiplied itself, and hence arose the necessity for providing an appeal to the

[1] *Mitākṣarā Vyavahārādhyāya*, Chapter 2, Verse 30.

King himself. This theory is substantially strengthened by the following text of Bṛhaspati. [1]'A judicial assembly is declared to be of four sorts—stationary, non-stationary, furnished with the King's signet ring, and directed by the King. The judges are of as many sorts. A stationary court meets in a town or village. One not stationary is called movable; one furnished with the signet ring is superintended by the chief judge; one directed is held in the King's presence.' It is clear that at least three of the judicial assemblies referred to by Bṛhaspati derive their authority from appointment by the King. There is a passage in Kauṭalya's Artha-S'āstra which establishes beyond all doubt that there has been a steady increase in the number of King's courts situate at different parts of a kingdom exercising different territorial jurisdictions.

[2] धर्मस्थास्त्रयस्त्रयोऽमात्या जनपदसन्धिसंग्रहद्रोणमुखस्थानीयेषु व्यावहारिकानर्थान् कुर्युः ।

[3] Groups of three ministers shall as judges deal with matters of litigation in the frontier of a province, *saṅgraha*, *droṇamukha* and *sthānīya*.

[1] *Sacred Books of the East*, Vol. XXXII, page 277.

[2] *Kauṭalya's Artha-S'āstra*, Adhikaraṇa 3, Adhyāya 1, Sūtra 1.

[3] The principal cities located in the midst of ten, four hundred and eight hundred villages are called Saṅgraha Droṇamukha and Sthānīya respectively. Vide *Kauṭalya's Artha-S'āstra*, Adhikaraṇa 2, Adhyāya 1, Sūtra 4.

अष्टशतग्राम्या मध्ये स्थानीयम्, चतुःशतग्राम्या द्रोणमुखम्, द्विशतग्राम्याः कार्वटिकम्, दशग्रामीसंग्रहेण संग्रहणं स्थापयेत् ॥

This discussion would have prominently brought to our minds the fact that the ancient Indian constitution witnessed a highly developed stage of judiciary.

But the noteworthy feature in the ancient constitution of judicial tribunals is the singular lack of well defined rules as to jurisdiction as between the royal and the popular courts. In Mediæval England the existence of a certain well defined practice as to the limits within which the King's Bench and the Common Law Court exercised their jurisdiction accounts for the abnormal growth of legal fictions as a contrivance to enable them to encroach upon each other's jurisdiction. In ancient India, so far as can be gathered from the Smṛtis, there was no rule prohibiting a court of superior jurisdiction to hear and decide a cause capable of being heard and disposed of by a court of inferior jurisdiction. A court exercising appellate jurisdiction over a particular cause can for the first time dispose of it as if it were an original court. A domestic litigation can be brought for the first time either in a *Kula* or any other superior court. Nor was there a difference in the nature of causes that can be decided by the King's court and popular courts. But the popular courts gradually died out on account of the greater certainty of law and uniformity of justice administered in the royal court. And, the restoration at a later stage of the village republics was due to the weakening of central government as a

result of foreign invasions. Hence we conclude that there was no necessity for the invention of fictions in the strict sense of the term at any period in the history of Hindu Law.

SECOND LECTURE

Although fictions in the sense known to the ancient Roman lawyer and to the ordinary English lawyer are rare in the Hindu jurisprudence, they are to be met with in plenty in the extended signification given by the eminent jurist, Sir Henry Maine. The growth of the right of alienation for valuable consideration by preserving the semblance of a gift which has been dealt with *in extenso* in the last chapter is a typical illustration of the development of law by a fiction in the wider sense of the term, namely, that of an assumption of law which serves to conceal that the original law has undergone a modification. Fictions as understood in the wider sense with which I propose to deal in the present chapter may, at the outset, so far as Hindu Law is concerned, be classified under two heads, namely, the fundamental fictions and the derived fictions. By a fundamental fiction, I mean any fiction on which are founded a number of other fictions. The leading fundamental fictions on which the entire edifice of Hindu theology and philosophy rests are the theories of the omniscience, infallibility and eternity of the Vedas. To understand the exact

significance of the theory of the Vedic omniscience, one has only to recall to his mind the famous maxim,

[1] अनन्ता वै वेदाः ।

'Vedas are unlimited' which leads to a twofold assumption. The primary assumption underlying the theory is that the subjects dealt with by the Vedas are unlimited. According to this view Vedas are supposed to deal with not merely the Hindu theology, ethics, positive morality and philosophy, but even with such materialistic sciences as rhetoric or poetics, music, warfare, engineering, architecture, and last but not the least, the positive law or the body of rules regulating the dealings between man and man as far as can be enforced by a court of law. Another equally important assumption underlying the theory of the omniscience of the Vedas is that not merely the several sciences recognised by the orthodox tradition are ultimately founded on the meagre foundations in the Vedas, but all of them exist in the Vedas in the same advanced stage as they are at present, and that every bit of later

[1] *Taittirīya Brāhmaṇa*, 3-10-11. In this connection the reader's attention is drawn to the following interesting Vedic passage.

"भरद्वाजो हि त्रिभिरायुर्भि र्ब्रह्मचर्यमुवास । तं ह जीर्णं स्थविरं शयानमिन्द्र उपव्रज्योवाच, भरद्वाज यत्ते चतुर्थमायुर्दद्यां किमनेन कुर्या इति । ब्रह्मचर्यमेवैनेन चरेयमिति होवाच । तं ह त्रीन् गिरिरूपानविज्ञातानिव दर्शयांचकार । तेषां हैकैकस्मान्मुष्टिमाददे । स होवाच । भरद्वाजेत्यामन्त्र्य । वेदा वा एते । अनन्ता वै वेदाः । एतद्वा एतैस्त्रिभिरायुर्भिरन्ववोचथाः । अथ त इतरदननूक्तमेव" ।

improvement of scientific ideas is completely lurking behind the purport of the ancient scriptures. The twofold assumption underlying the omniscience of the Vedas has a striking parallel in a curious theory propounded in the Mahābhārata relating to its contents, namely,

[1] यन्नेहास्ति न कुत्रचित् ।

'What is not found here is nowhere else.'

Touching the theory of the eternity of the Vedas, it ought to be mentioned at the outset that there is a slight divergence of opinion among the orthodox schools of thinkers although the spirit by which they are all guided is the same. The distinctions that the different schools of thought indulge in, are, in reality, petty and highly technical, and are simply calculated to throw dust on the eyes of the lay public in the perception of the real origin of the Vedas. Western scholars of Sanskrit are of opinion that the entire Vedic literature is not the outcome of the same era in the history of Indian literature, as it bears traces of the composition of different ages and of different authors. The Ṛg Veda, for instance, is supposed to be a collection of hymns which represent the effusion of the unsophisticated human heart accustomed to plain living and high thinking. The Sāma Veda is represented to be the outcome of a desire to perpetuate the ancient hymns of the Vedic

[1] *Mahābhārata, Ādi Parva*, Adhyāya 62, S'loka 26.

bards by combining them with music and rhyme. The Yajurveda on the other hand bears traces of an advanced age of Brahmin supremacy when the ritual, the principal instrument by which the priestly class contrived to hold their sway over the popular mind, was the all-engrossing subject for the enlightened public of the day. The Āraṇyakas and the Upaniṣads belong to a still later era. This theory of the Western savants of Sanskrit flouts the opinion of the orthodox schools of thinkers, and will be characterised by them as grossly materialistic and contrary to all received notions. With regard to the origin of the Vedas, among the orthodox schools there is absolute unanimity in the matter of denying a human origin, although as between themselves they hold contrary views as to the exact character of their superhuman origin, and may be divided into two groups, those that say that Vēda is *Pauruṣeya* and those that say that Veda is *Apauruṣeya*. The *Pauruṣeya* theory of which the Nyāya school of thinkers are the strongest advocates, conceives the Veda as having been composed and pronounced by the Deity in the same way as any other verbal statement is made by a man with full consciousness of the purport of his statement. The *Apauruṣeya* theory is adopted by the followers of the Mīmāṁsā and Vedānta systems of philosophy with a slight shade of difference among themselves which is

purely technical and adapted to the favourite theories of the respective schools, and not calculated to express decidedly any substantial distinction. According to the *Apauruṣeya* theory of the Vedāntins, Vedas are as much pronounced by God as any other statement by a mortal, but without independence in the matter of composition, and at the beginning of each Kalpa, God mechanically reproduces the Vedas which had already been in existence in a previous Kalpa. According to the Mīmāṁsā school of thinkers who are the most headstrong champions of the ritualistic aspect of Vedas, Vedas are as eternal as the world itself, and cannot be ascribed to any origin, and God is in no way responsible either for the pronouncement or the composition of the Vedas. This theory is certainly in keeping with the peculiar doctrine of Jaimini propounded in the *Devatādhikaraṇa* by which Godhead itself is not recognised. Hence according to the Mīmāṁsakas, Vedas have been from eternity handed down from generation to generation, by man to man by word of mouth, and no particular stage of time can be described as having witnessed the origin of Vedas. This idea has been so ably and briefly expressed in a maxim of theirs :

[1] न कदाचिदनीदृशं जगत्

[1] *Gauḍa Brahmānandīya* (Nirnayasagara Press edition), page 170, and *Bindu Ṭīkā* page 11.

"At no time was the world unlike what it is." To sum up the distinction between these three orthodox schools on the origin of Vedas, the Nyāya school holds the view that Īswara is responsible for both the composition and the pronouncement of the Holy Scriptures; the Vedānta school accepts the theory that God is not responsible for the composition, but for the mechanical reproduction at the beginning of the creation; while the Mīmāṁsaka school maintains that God is responsible neither for the composition nor for the utterance. But all the schools proceed on the assumption of the eternity of the Vedas. This is one of the fictions that has acquired such a permanent grip upon the national mind that even in this advanced age of civilisation, in spite of the disintegrating and denationalising influences of the west, thousands of persons, whether brought up in old traditions or in modern ideas continue to consider it a sin to believe that Vedas are otherwise than eternal.

With regard to the theory of the infallibility of Vedas, one would naturally conclude from the fact that the Vedas are the ultimate foundation of the Hindu religion, that Veda is an exclusively religious code; but this is emphatically negatived by the Mīmāṁsakas who lay down that the Vedas represent a homogeneous code of rules relating to law and ethics by reason of the very wide significance ascribed by them to the word 'Dharma'

which is supposed to be the only topic dealt with by the Vedas. One of the fundamental conceptions of the Mīmāṁsā school about the subject matter of the Veda is that it entirely and exclusively concerns itself with Dharma. The definition of Dharma has been given by Jaimini in the second aphorism of his Mīmāṁsā—

चोदनालक्षणोऽर्थो धर्मः ।

"That which is signified by a command and leads to a benefit is called Dharma." This definition of Dharma will be seen to apply not merely to rules of morality, ethics and religion, but also to rules of Positive law. It therefore follows according to the Mīmāṁsakas that Veda is the only source of knowledge about Dharma, and Dharma is the only topic dealt with by the Veda. Of course there is some slight disagreement which is not of much practical consequence between the Prābhākara, Bhāṭṭa and other orthodox schools as to the exact signification of the word Dharma. While the Prābhākara school restricts the denotation of the word to the act actually commanded by a Vedic Vidhi, the Nyāya school of thinkers maintain that the word denotes the invisible effect named *Apūrva* which attaches to the soul on the performance of a religious act and endures until the attainment of the benefit contemplated by the act, and the Bhāṭṭa school gives a much wider meaning to the word by

holding that the act enjoined by a *Vidhi* and the material connected therewith do all come within the definition of Dharma. If Dharma is the only topic of the Veda, and it is conveyed by a Vidhi alone, how are we to account for the innumerable Vedic passages which obviously do not deal with Dharma, and how are we to ascribe authority to the major portion of the Vedic literature that does not evidently consist of Vidhis or commands? Does it not lead to the conclusion that the entire non-vidhi portion of the Vedic literature is of no authority? To answer these objections, we have to bear in mind the fourfold classification of the Vedas adopted by the Mīmāṁsakas into *Vidhi* or a command which includes a *Pratiṣedha* or prohibition, *Mantra* or a hymn addressed to Gods at a sacrifice, *Arthavāda* or the passages of Veda where a certain act commanded or prohibited by a Vidhi is praised or condemned, and lastly into *Nāmadheya* or the nomenclatory portion. This fourfold distinction is dominated by the idea of the all importance of the ritual, and certainly much later than the other classification of the Vedas to be met with in ancient treatises into two classes, namely *Mantra* and *Brāhmaṇa*.

There are various tests laid down by Mīmāṁsakas to distinguish each of the four classes into which Veda has been divided, and which have been uniformly adopted in all Mīmāṁsā works. In order to arrive at a correct estimate of the different degrees

of authority ascribed to the different classes of Vedas, it is better to enter into the question of distinguishing the different classes of Vedas in minute detail. Of the four classes mentioned above, the one that occupies the least space in the whole range of Vedic literature is the *Nāmadheya*. *Nāmadheya* is that portion of the Veda which denotes the name of a sacrifice. Four tests are laid down by the Mīmāṁsakas to distinguish the *Nāmadheya* portion from the rest in the Veda. The first *is the avoidance of lakṣaṇā* or deviation from the literal meaning.[1] By way of illustration the term *Udbhid* in the Vēdic text:

[2] उद्भिदा यजेत पशुकामः ।

is also mentioned. The subject is exhaustively dealt with in what is known as the *Udbhidadhikaraṇa* in Jaimini's Mīmāṁsā wherein a doubt is raised whether the word *Udbhid* occurring in the text is the name of a sacrifice or the name of a material to be used at a sacrifice. An objection is put forward that *Udbhid* means an axe by adopting the *karaṇavyutpatti* or a derivation involving the instrumental case. In answer it is pointed out that even if an axe or anything of that sort is supposed to be the literal meaning of the word *Udbhid*, in view of the juxtaposition of the root *Yaj* meaning a sacrifice, it has to be interpreted to mean not 'an axe' but

[1] *Jaimini's Pūrva Mīmāṁsā*, 1, 4, Adhikaraṇa 2.
[2] *Tāṇḍya Brāhmaṇa*, 19-7-3.

'possessed of an axe' which is not its literal meaning. Therefore by taking the literal meaning of the word to be an axe, the interpretation of the text in question involves *Matvarthalakṣaṇā*, and when it is possible to understand a particular word in its literal meaning, it is improper to adopt a construction which would involve a deviation from the literal meaning, and therefore *Udbhid* ought to be treated as the name of a sacrifice. The second test laid down by Jaimini for identifying a Nāmadheya is *the avoidance of vākyabheda* or multiplicity of principal clauses.[1] A question is raised whether the term *Citrā* in the text:

[2] चित्रया यजेत पशुकामः

is a nomenclature, or denotes a material to be offered at a sacrifice. In the latter view it would follow that the two qualities of variegated colour and feminine gender—*citratva* and *strītva*—are enjoined, and as this inevitably leads to a *Vākyabheda* (lit. the splitting up of a sentence) or a plurality of co-ordinate ideas which it is always the attempt of Mīmāṁsakas to avoid, the theory is upheld that *citrā* is the name of a sacrifice. A third test to find out a Nāmadheya goes technically by the name of the *Tatprakhyanyāya*.[3] This principle is applied in texts like

[1] *Jaimini's Pūrva Mīmāṁsā*, 1, 4, Adhikaraṇa 3.
[2] *Taitttirīya Saṁhitā*, 2-4-6.
[3] *Jaimini's Pūrva Mīmāṁsā*, 1, 4, Adhikaraṇa 4.

[1] अग्निहोत्रं जुहोति and [2] आघारमाघारयति

to find out whether the words, Agnihotra and others are to be treated as the names of sacrifices or not. Where two texts refer to the same member of a sacrifice, the prior text it is that really lays down the auxiliary of the sacrifice, and the word referring to the same idea in the latter text must be deemed to be a nomenclature. The last test laid down for distinguishing the *Nāmadhēya* is called the [3] *Tadvyapades'a* principle by means of which words like *s'yena* or eagle and others occurring in texts like

[3] श्येनेनाभिचरन् यजेत

should be construed as denoting the names of sacrifices; for, the said text is followed by a complementary passage which says 'just as a s'yena pounces upon and takes away his prey, so does the sacrifice in question pounce upon and take away the enemy.' By means of the simile suggested between the literal meaning of the word *s'yena* and the sacrifice in the command of which the word occurs, it has been settled that *s'yena* denotes the name of a sacrifice. The above discussion will show that the Nāmadheya portion of the Vedic literature has no authority by itself, but depends for its authority upon other texts of which the Nāmadheyas are to be treated as part and parcel.

[1] *Taittirīya Saṁhitā*, 1-5-9.
[2] *Ibid.*, 2-5-11 and 6-3-7.
[3] *Jaimini's Pūrva Mīmāṁsā*, 1, 4, Adhikaraṇa 5.

The next class of Vedic texts that deserves our consideration is the Mantra portion. Mantras are generally hymns addressed to Gods at sacrifices. The general function that they are believed to discharge is what is known as *Anuṣṭheyārthaprakāśana*, that is, the bringing to mind a thing that ought to be performed. Mantras are generally divided into three classes: *Ṛk mantras*, *Yajur mantras* and *Sāma mantras*. This classification is not to be confounded with the division of the Vedic literature into the well known three Vedas, namely, *Ṛg Veda*, *Yajur Veda*, and *Sāma Veda*. The difference between these two classifications is clearly brought out in the chapter of Pūrva Mīmāṁsā relating to the discussion of the relative weight of *upakrama* or the beginning, and *upasaṁhāra* or the close. The words—*Ṛk*, *Sāman* and *Yajus* are defined by Jaimini himself in the three following aphorisms:

(1) तेषामृग्यत्रार्थवशेन पादव्यवस्था, (2) गीतिषु सामाख्या, and (3) शेषे यजुश्शब्दः[1]

Such of the mantras as are composed in metre are *Ṛks*; *Sāman* is the word applied to the different methods of chanting recognised in the Vedas; and the entire residue of the mantra literature goes by the name of *Yajus*. From the above definition it will be seen that the classification of mantras into Ṛk, Yajus and

[1] *Jaimini's Pūrva Mīmaṁsā*, 2, 1, Sūtras, 35, 36, 37.

Sāman does not in any way correspond to the threefold classification of the Vedas by the same names, for it is possible to have a Ṛk either in the Yajurveda or the Sāmaveda and vice versa. In establishing the theory that when there is a conflict between the beginning and the end of any Vedic passage the former is to prevail, the discussion in Pūrva Mīmāṁsā turns upon the construction of the words Ṛk, Yajus and Sāman occurring in the text

[1] उच्चैर्ऋचा क्रियते, उपांशु यजुषा, उच्चैस्साम्ना ।

By the Ṛk it is done loudly, by the Yajus in a low tone, and by the Sāman in a loud tone. The question that is considered there is, which of the two possible constructions is to be preferred. Does the text mean that in the course of performance of acts prescribed by the respective Vedas, the mantras which form a subsidiary to such sacrifices are to be pronounced in the respective tones? Or, does it mean that the different mantras are to be pronounced in the different tones irrespective of the Vedas to which they belong? The view is put forward at the outset that as the words Ṛk, Yajus and Sāman refer to the mantras according to Jaimini's definition, the text is to be construed as regulating the methods of pronouncing the mantras whether the act in the course of which they are pronounced belongs to one

[1] *Jaimini's Pūrva Mīmāṁsā*, 3. 3, Adhikaraṇa 2.

Veda or the other. This *prima facie* view is refuted, and the theory is established that the said words in the above text refer only to the Vedas, because the text which precedes the present one bears unmistakable reference to the Vedas. As a prelude to the present text, there is found a reference to the origin of the Ṛgveda from Agni or Fire-God, of the Yajurveda from Vāyu or the Wind-God, and of the Sāmaveda from Āditya or the Sun-God. It therefore follows that the words, Ṛk, Yajus and Sāman in the succeeding text refer to the Vedas. But so far as the question of the authority of the Mantra portion is concerned, it ought to be concluded that it simply serves the purpose of recalling to mind the deities for whose propitiation the sacrifices enjoined by the Vidhi portion are performed. The result is that the Mantras have no authority by themselves, but play a subservient part to the Vidhis inasmuch as they aid the completion of acts enjoined by Vidhi texts.

Then we pass on to consider the authority of the Arthavāda portion of the Vedas. In estimating the weight of this peculiar class of Vedic texts, we have to bear in mind the peculiar exegetical principle propounded by Jaimini to which he gives expression in the following sūtra :

[1] आम्नायस्य क्रियार्थत्वादानर्थक्यमतदर्थानाम् ।

[1] *Jaimini's Pūrva Mīmāṁsā*, 1-2, Sūtra 1.

As the sole purpose of the Vēda is the commanding of acts, such of those as do not compel the performance of an act are invalid.

According to this theory, the Vidhi portion which of course includes the Pratiṣēdha is the only operative portion in the whole range of the Vedic literature. All other passages must with all possible ingenuity be brought round, and interpreted so as to harmonise with, and play a subservient part to the Vidhis. Arthavādas must be invariably taken as forming an indispensable part of the Vidhi. The process by which Arthavādas are made a complement to the Vidhi is based upon the Mīmāṁsā principle that when a principal text in whose neighbourhood an Arthavāda is situate, commands the performance of an act, the complementary Arthavāda text must be deemed to praise or eulogise the act commanded, and when a principal text prohibits a certain act, the complementary Arthavāda must be deemed to condemn the prohibited act. An example of the former is seen in the Arthavāda text :

[1] वायुर्वै क्षेपिष्ठा देवता, वायुमेव स्वेन भागधेयेनोपधावति, स एवैनं भूतिं गमयति ।

'Wind-God is the swiftest deity ; one approaches him by his own good luck; and He alone brings him prosperity' which follows the Vidhi text—

[1] वायव्यं श्वेतमालभेत भूतिकामः

[1] *Taittirīya Saṁhitā*, 2, 1, 1.

A man desirous of prosperity must sacrifice a white beast for Vāyu.

An illustration of a Pratiṣēdha or a prohibitory text followed by a condemnatory Arthavāda is to be seen in the following passage : [1] 'Silver ought not to be given in the *barhis* sacrifice. Rudra wept, and his tears became silver. A giver of silver will witness weeping in his house before the expiry of a year.'

In spite of the supposed want of independent authority of Arthavādas, it is a noteworthy fact that Arthavādas do really form the bulk of the Vedas. Most of the Vedic passages in the Karmakāṇḍa belong to the category of Arthavādas, and the Upaniṣads which constitute the Jñānakāṇḍa of the Vedas are according to the Mīmāṁsaka theory an Arthavāda intended to praise the sacrificer as one of the principal instrumentalities by which a sacrifice is brought into existence. When a sacrifice is enjoined by the ritualistic Veda, a curiosity naturally arises as to the character of the soul wherein an invisible effect is supposed to be produced by the performance of a sacrifice, which is ultimately presumed to lead to the benefit in contemplation. Hence arises the necessity of diving deep into the mysteries of Creation, transmigration of soul and the excellent qualities of which a sacrificer's soul is possessed. In the result, the whole of the philosophical branch of the Vedas is brushed

[1] *Taittirīya Saṁhitā*, 1, 5, 2.

aside as of no independent authority. Of course, among the orthodox thinkers themselves, there is the other school headed by the Vedāntins who maintain the independent authority of the Upaniṣadic passages, and who for this purpose refute with consummate vehemence the theory of the invalidity of passages which do not enjoin or prohibit an act. The anomalies resulting from the theory that nothing but a commanding statement has any force, reach their climax under the influence of the Prābhākara school who formulate the theory that the rule of the invalidity of non-commanding statements is not confined to Vedic texts, but ought to be applied even in ordinary language. Hence it is well settled that Arthavādas have no independent authority of their own. But at the same time, some sort of authority has to be attributed to them as they form the major portion of the Vedas. Most of the Arthavādas are seen to be absurd and opposed to common sense according to their literal meaning. For instance, there is a text which says that stones float on water; another text says that kine performed the *satra* sacrifice. Some other Arthavādas are mere repetitions of commonplace things, and some others narrate historical anecdotes, fables and genealogies. In order to estimate the value of the Arthavāda in general, it is necessary to bear in mind the oft-quoted threefold distinction of Arthavādas into *Guṇavāda*, *Anuvāda* and *Bhūtārthavāda*.

[1] विरोधे गुणवादः स्यादनुवादोऽवधारिते ।
भूतार्थवादस्तद्धानादर्थवादस्त्रिधा मतः ॥

When an Arthavāda text is on the face of it opposed to commonsense, it is said to be a Guṇavāda; when it is a mere repetition of a thing already known it is an Anuvāda; and the rest of the Arthavādas are known by the name of Bhūtārthavāda.

The two texts [2] ग्रावाणः प्लवन्ते and [3] गावस्सत्रमासत 'Stones float on water' and 'Kine performed the satra sacrifice' illustrate the first of the three classes of Arthavādas mentioned above. The second class is typically illustrated by the text

[4] अग्निर्हिमस्य भेषजम्

'Fire is antidote for snow.' The story of S'unaḥs'epha and similar other narrations recorded in the Arthavādas serve to illustrate the last class. When such is the meaning actually borne out by the letter of the Arthavādas, it is no wonder that Mīmāṁsakas, who are staunch believers in the infallibility of every syllable of the Vedas, are obliged to deprive the Arthavāda texts of their natural meaning, and to accept a forced interpretation by means of which they may be presumed to

[1] *Ānandagiri on Brahmasūtra Bhāṣya* under 1, 3, Sūtra 33.

[2] *Cf.* शृणोत ग्रावाणः, *Taittirīya Saṁhitā*, 1, 3, 13.

[3] *Taittirīya Saṁhitā*, 7, 5, 1.

[4] *Taittirīya Saṁhitā*, 7, 4, 18.

repeat things contained in the Vidhi texts in a laudatory or condemnatory tone.

Whatever pains may be bestowed on the construction of Arthavādas so as to harmonise them with the theory of the absolute infallibility of every bit of Vedic literature, there is the noteworthy historical fact that Arthavādas played an important part in the development of rules contained in the Vidhi texts by way of extension, restriction or modification of their scope. On most occasions Arthavādas succeed in effecting this result by professing to elucidate or fix the meaning of words occurring in a Vidhi text. The importance of the peculiar part played by an Arthavāda in this direction is fully realised by the Mīmāṁsakas themselves, as may be clearly seen from the discussion relating to the meaning of the text:

[1] अक्ताश्शर्करा उपदधाति

'One arranges the anointed pebbles.'

The doubt is raised for consideration whether the pebbles may be besmeared with any substance like ghee, oil, etc., capable of effecting the ointment, or whether the ointment is to be effected by the application of any particular substance. The theory is proposed that as the Vidhi text contains no restrictive provision as to the substance by which the ointment is to be effected, a sacrificer is at

[1] *Taittirīya Brāhmaṇa*, 3, 12, 5.

liberty to anoint by whatsoever means he likes. In answer it is pointed out that the Arthavāda text which follows the said Vidhi text contains a reference to ghee. The Arthavāda itself means 'for ghee is splendour'. [1] तेजो वै घृतम्. By reason of the fact that ghee is eulogised by the complementary Arthavāda, the principal Vidhi text ought to be construed as laying down an ointment by ghee alone. This discussion illustrates the consciousness of the Mīmāṁsā philosophers of the hard fact that on more than one important occasion, an Arthavāda ultimately alters the meaning of a command to which it is supposed to be subservient. Instances may also be drawn from the Smṛti literature, of Arthavādas, which, instead of restricting as in the former illustration, exercise their influence by extending the meaning of the principal Vidhi texts to which they are appended. A text of Atri lays down adoption for a sonless man thus:

[2] अपुत्रेणैव कर्तव्यः पुत्रप्रतिनिधिस्सदा ।
पिण्डोदकक्रियाहेतोर्यस्मात्कस्मात्प्रयत्नतः ॥

Only by a sonless man shall be made a substitute for a son by all possible efforts for the purpose of the offering of libations and water.

The text simply says that a man destitute of a son shall be entitled to adopt. The plain

[1] *Taittirīya Brāhmaṇa*, 3, 12, 5.
[2] *Atri-Smṛti*, Verse, 52.

meaning of the word 'son' in the above text has been expanded by the following Arthavāda:

[1] पुत्रेण लोकाञ्जयति पौत्रेणानन्त्यमश्नुते ।
अथ पुत्रस्य पौत्रेण ब्रध्नस्याप्नोति विष्टपम् ॥

'A man conquers the world by a son, by a son's son attains immortality, and by a son's grandson attains the world of Sun.'

The effect of reading the Vidhi and Arthavāda texts together is that when a man is possessed of a son or a son's son or a son's grandson, he is not entitled to take a boy in adoption.

Instances of extension, modification or restriction of a Vidhi text by an Arthavāda may be multiplied, but we rest content with the illustrations already given. Nevertheless the theory is that no such alteration of Vidhi by Arthavāda is possible. This is the principle enunciated in the [2] *Hetuvannigadādhikaraṇa* of Jaimini which had often been the subject of reference by courts of law and Sanskrit scholars employed therein in the past century in connection with the determination of the question of the validity of an only-son-adoption. The relevant text of Vasiṣṭha on the point expressly prohibits such an adoption, and the same is followed by a reasoning clause. The text itself runs thus:

[1] *Manu*, 9, 137. Vide also the discussion in Dattaka Mīmāṃsā on Atri's text.

[2] *Jaimini's Pūrva Mīmāṁsā*, 1, 2, Adhikaraṇa 3.

[1] न त्वेकं पुत्रं दद्यात्प्रतिगृह्णीयाद्वा, स हि सन्तानाय पूर्वेषाम् ।

'One shall not take or receive an only son in adoption, for he is for the continuation of the line of his ancestors.'

The eminent Sanskrit scholar Mr. Mandlik held the view which was also adopted by the law courts at Madras and Allahabad that the above prohibition has not the effect of absolutely negativing the status of an adopted son to a boy taken in contravention of the rule. His argument, he said, was based on the principle of the Hetuvannigadādhikaraṇa which he conceived as laying down in broad terms a general proposition that any command followed by a reasoning clause is absolutely null and void. This theory is really opposed to the actual principle laid down in the said adhikaraṇa, and is due to an incorrect understanding of the discussion to which it relates. The point about which the whole discussion turns is the meaning to be given to the text :

[2] शूर्पेण जुहोति, तेन ह्यन्नं क्रियते ।

'One shall perform Homa by the winnow, for by it food is made.'

The question discussed is whether the Homa under question ought to be performed only with the

[1] *Vasiṣṭha Smṛti*, Chapter 15, Sūtras 3 and 4.
[2] *Taittirīya Brāhmaṇa*, 1, 6, 5.

winnow which is expressly mentioned in the commanding clause of the text, or whether the Homa can be performed with a pounding rod, a jar or a spoon or any other implement used in the preparation of food on account of the applicability of the reasoning clause to such other materials. In conclusion, the former view is upheld principally on the ground that it is not just to accept a deviation from the literal meaning in a commanding text, and that when the choice lies between straining a word in a Vidhi and that in an Arthavāda, the latter ought to be preferred. If we are to strain the language of the Vidhi text in the light of the Arthavāda, the word 'winnow' has to be given an extended signification. If we choose to strain the Arthavāda in the light of Vidhi, we have to presume that the reason for the winnow being the subject of Homa is not the capacity to produce food in general, but the particular capacity of producing food inhering in the winnow. In the result, the food-productive capacity of the winnow is referred to as recommendatory rather than by way of an independent reason in support of Vidhi. It therefore follows that the scope of any commanding clause is not to be extended by reason of a succeeding reasoning clause, and that the reasoning clause ought to be restricted in its operation to the particular object which comes within the purview of the commanding clause. Such being the principle enunciated in the

adhikaraṇa, it is no authority for the position that all commanding clauses followed by reasoning clauses are infructuous. It rather establishes that all reasoning clauses following commands are infructuous. On the application of this principle to Vasiṣṭha's text, Mr. Mandlik's view is wholly untenable. All the same it ought to be admitted that whenever it suits their purpose, the Mīmāṁsakas mitigate the effect of the principle of this adhikaraṇa by introducing refined technical distinctions and adopting a liberal interpretation of words occurring in a Vidhi text.

We have now dealt with the so called primary source of positive law, namely the Vedas. But the singular lack of rules relating to positive law in the very wide range of Vedic literature irresistibly leads to the conclusion that Vedas cannot be treated as an important source of law except by a legal fiction. This fiction is very rigorously kept up so much so that the really important source of positive law, namely, the Smṛti literature is supposed to rest for its validity and binding character not upon its own independent intrinsic merit, but upon its foundation in the Vedas. It is an open secret that there are no corresponding texts in the Vedas for most of the Smṛti rules, especially for those which fall within the province of positive law, and it is impossible to conceive that any basis for such rules could be

found in the S'ruti except by a wide stretch of imagination. In fact, the Smṛtis would have lost their purpose, had the rules laid down therein been found in the S'ruti texts. Yet the theory is maintained that the sages who composed the several Smṛtis actually saw, or more appropriately heard the Revelation, and recorded their reminiscences in accordance therewith in the form of Smṛtis.

[1] श्रुतिं पश्यन्ति मुनयः स्मरन्ति च तथा स्मृतिम् ॥

The two words *S'ruti* and *Smṛti* themselves lend support to this wild theory. S'ruti literally means that which is heard, and Smṛti that which is remembered. The very absence of a real Vedic basis for most of the Smṛti rules except by a legal fiction gave rise to widely divergent theories that had swayed the minds of scholars from time to time whose one common object was to try their level best to establish a Vedic origin of the Smṛtis. As it would be extremely difficult within the short compass of these lectures to deal with all the theories about the emanation of Smṛtis from S'ruti, I shall confine my attention to the three most important theories. One of the theories goes by the name of *Utsannavāda* or the theory of the 'Lost S'ruti'. According to this theory the Vedic texts which served as the foundation of Smṛti texts were actually available to the authors of Smṛtis,

[1] *Manu's text cited in Smṛti-Muktāphala.*

but have since become extinct on account of desuetude. This theory militates against the doctrine of the eternity of Vedas, and is therefore rejected by the Mīmāṁsakas on the following among other grounds. Firstly, it cuts at the root the view that Vedas do not owe their existence to any origin, human or divine; secondly, the Vedas and the sounds or Varṇas which constitute the Vedas and their arrangement are eternal; thirdly, the orthodox section of the public have from time immemorial spared no pains to preserve in tact the entire Veda without missing even a syllable or an accent, and as a matter of fact there have been actually recorded in authoritative works the number of Vedas, the number of recensions, the number of chapters, of verses, of words, of syllables, of sounds, etc., so that anything that falls outside the recorded categories cannot be deemed to belong to the Vedas.

Another theory which is farther from truth, but nearer technical accuracy than the theory of the Lost S'ruti is what is known as the *Pracchanna-vāda* or the theory of the 'Hidden S'ruti'. According to this theory, the Vedic text on which a Smṛti is founded, is eternally hidden in the Veda, and its existence is to be known for ever by inference. The mere fact that the authors of Smṛtis whc are themselves ardent believers in the sole supreme authority of Vedas have laid down rules for the

guidance of the actions of human beings is supposed to point unequivocally to a S'ruti which is lurking behind the one actually in vogue. This theory has got the merit of satisfying the objection raised in the light of the theory of the eternity of Vedas, and at the same time hints that the inferential S'ruti originating a Smṛti is a postulate which is not allowed to be disputed. The soundness of this theory, however much it may satisfy scientific accuracy, cannot be maintained except by sophistry. The former theory whereby the S'ruti texts on which the Smṛtis are founded are deemed to have been extant in the ages in which the Smṛtis were composed, is at least plausible though logically inaccurate, and involves a smaller degree of fiction than the theory of the Latent S'ruti. Hence the modern Mīmāṁsakas headed by Kumārila Bhaṭṭa, the famous author of the three monumental works of Mīmāṁsā, namely S'loka-vārtika, Tantravārtika, and Ṭupṭīkā, struck a via media by adopting a theory which for brevity's sake may be styled as the *Pratyakṣavāda* or the theory of the 'Patent S'ruti', according to which the S'ruti texts which serve as the foundation for the Smṛtis are deemed to be available in the extant Vedic literature itself, and that every bit of Smṛti has a corresponding S'ruti original. In this view there is no need for conceiving the existence of a lost S'ruti or for presuming a S'ruti text by inference. The entire body of rules clearly laid down in the Smṛtis can by a shrewd

observer be found to be based on actual texts in the available S'ruti literature, and if one is not able to trace the Vedic origin of a Smṛti, it only means that the necessary patience, knowledge and legal acumen are not forthcoming. This theory is pushed to such a length that the Vārtikakāra and all posterior Mīmāṁsā scholars have cited Vedic texts as the foundation of Smṛti rules in cases where the authors and sages of bygone ages have found none. The advantages of this last theory over others can be summarised as follows. It neither offends the theory of Vedic eternity, nor does it call to its aid a presumed S'ruti as a creature of eternal inference. It satisfies the pride of the orthodox section who lay the highest pretensions to the honour of preserving their sacred literature from time immemorial in tact; and the ancient works recording the details from the number of recensions down to the syllabic instants of which the Vedas are composed, are placed far above suspicion. The only disadvantage of this theory is that in certain cases, the efforts of spelling out an originating text from the Vedas, of straining its meaning, of wresting it from its context and of deriving the desired purport therefrom border upon the ludicrous, and clearly prompt one to imagine that it is a head for a cap, and not a cap for a head. The objection is anticipated in the Mīmāṁsā treatises themselves that if the Smṛtis are nothing more nor less than Vedic rules there is no special purpose

served by the Smṛti composition. This objection is met satisfactorily, by pointing out that in spite of the fact that the Smṛti rules are *in toto* found within the available S'ruti literature, they are dispersed over a very wide range which is not possible for an ordinary man to scrutinise or master. The Smṛtis are useful as manuals of rules to be gathered from the different contexts in the Vedas by placing within the easy reach of ordinary mortals all the available material necessary for the guidance of human conduct. These observations relating to the Vedic origin of Smṛtis ought not to be confined to works of Dharma S'āstra which are ordinarily understood by the term Smṛti; for, the denotation of the word *Smṛti* recognised by scientific treatises is much more comprehensive so as to include the Kalpasūtras and various other works, for example, grammar—in short, anything composed by a Ṛṣi.

Now I shall attempt to cite a few approved illustrations of Smṛtis derived from Vedas. Some of the Smṛtis arise by necessary implication from certain Vedic passages, some others have to be distilled from discussions in Vedic Arthavādas, some from Mantras, and some are foreshadowed in the Vedas as a matter of common knowledge. Of the last which are said to be derived from the Vedas by *Siddhavannirdes'a* the following illustrations may be given. There is a Smṛti text which lays down that women desirous of applying collyrium to their

eyes must apply the same first to the left eye, and then to the right eye. An origin for this Smṛti rule is found in a Vedic text occurring in the context of a sacrifice which lays down that a sacrificer ought to anoint his right eye first, and recites apparently as a reason the fact that on other occasions men begin the anointment with the left eye. The Vedic text which is supposed to have originated the Smṛti rule under question is as follows:

[1] नयनं दक्षिणं दीक्षितः पूर्वमङ्क्ते, सव्यं हि मनुष्याः पूर्वमञ्जते ।

A sacrificer anoints his right eye first, for men anoint their left eye first. This rule is fully borne in mind by Kāḷidāsa in his Raghuvaṁśa where he describes the sensation of the women of Bhōja's city occasioned by the entry of Aja on the eve of the honeymoon along with the newly married bride—Indumatī. The verse reads as follows:

[2] विलोचनं दक्षिणमञ्जनेन संभाव्य तद्वञ्चितवामनेत्रा ।
तथैव वातायनसन्निकर्षं ययौ शलाकामपरा वहन्ती ॥

Another damsel after ornamenting her right eye with collyrium, with her left eye cheated of the same, went near the window in the same posture bearing the pencil (used in anointing).

The context in which the above passage occurs describes a series of acts on the part of the ladies of

[1] *Taittirīya Saṁhitā*, 6, 1, 1.
[2] *Raghuvaṁśa*, Canto 7, verse 8.

the city evidencing a subversion of the normal condition of things and the hurry in which they left their ordinary avocations in order to have a view of the newly married couple going on procession in the streets of the city. Mallinātha rightly brings out the heart of the poet by saying that Kālidāsa here intends to convey that on account of the jubilation prevalent in the city, women even forgot the elementary rule of S'āstra prescribing the ointment of the left before the right eye.

The author of S'āstradīpikā refers to another case of a Smṛti rule as having been derived from a *Siddhavannirdes'a* in the Vedas. There is a text of Manu to the effect that one ought not to surrender a refugee to his enemy.

[1] शरणागतं परित्यज्य वेदं विप्लाव्य च द्विजः ।
संवत्सरं यवाहारस्तत्पापमपसेधति ॥

The sin incurred by a man forsaking a person who has sought shelter, and by a Brahmin teaching Veda to one not entitled to it, disappears by the confinement of diet to Yava for one year.

The portion relating to the abandonment of a refugee is sought to be traced to a Vedic text which occurs in the course of a fable narrated by an Arthavāda. In the Jyotiṣṭoma sacrifice many vessels are used for holding the extracted juice to be offered, and they are called *Grahas*. Some of the

[1] *Manu*, Chapter 11, Verse 198.

Grahas are supposed to be presided over by a single deity, and some by a double deity. There are various rules laid down for the pouring of the extracted soma juice from one vessel to another, by one of which it is recited that the juice in the vessel presided over by Āditya must be taken from the vessel presided over by double deities. An incident is related which apparently furnishes a reason for doing so. In the course of the sacrifice, the Gods are said to have forgotten Rudra who thereupon got furious, and assaulted Āditya. Out of fear from Rudra, Ādityas took shelter under the dual divinities who refused to surrender them to Rudra. Therefore it is that men do not give away to the enemy one who has sought protection even though he deserves to be killed; and hence, juice in the Āditya vessel must be taken from vessels presided over by dual Gods.

[1] देवा वै यज्ञाद्रुद्रमन्तरायन् । स आदित्यानन्वाक्रमत । ते द्विदेवत्यान्प्रापद्यन्त । तान्न प्रतिप्रायच्छन् । तस्मादपि वध्यं प्रपन्नं न प्रतिप्रयच्छन्ति । तस्माद्द्विदेवत्येभ्य आदित्यो गृह्यते ।

It will be highly interesting to note another illustration furnished by S'āstradīpikā as throwing considerable light upon the curious method of fishing out a warrant for a Smṛti rule in the Vedas. In the Prāyas'cittādhyāya Manu says:

[1] *Taittirīya Saṁhitā*, 6, 5, 6.

[1] हत्वा गर्भमविज्ञातमेतदेव व्रतं चरेत् ।

which means that by causing miscarriage of a child in the womb the author of the mischief subjects himself to the penalty consequent upon the slaughter of a Brahmin. A humorous story is told in the Vedas to which is ascribed the origin of the Smṛti rule. Various Mantras are directed to be recited at the time of pouring down the soma juice from one vessel to another, and at the time of actually offering it to the fire. One of the vessels which are prescribed for holding the juice goes by the name of *Āgrayaṇa*. When the soma juice is poured from the big vessel in which it was extracted into the *Āgrayaṇa* vessel, a Mantra is recited which contains no specific reference to any God by name, a circumstance which differentiates it from the Mantras recited at the pouring of Soma into other vessels. As a consequence of the said distinction, the soma juice held by the other vessels is allowed to be thrown into the fire by means of the same vessels, whereas the soma juice held in the *Āgrayaṇa* vessel ought to be poured first into the vessel presided over by God Vāyu, and by means of the latter should be offered to the fire. The reason ascribed for this distinction is that since the Mantra recited at the pouring of the juice into the Āgrayaṇa vessel contains no deity, it is *unknown*, but the defect is removed by taking it again to the

[1] *Manu*, Chapter 11, Verse 87.

vessel of Vāyu, for in the said process, a Mantra has to be recited which mentions a God by name; and this is the reason why the destruction of a womb whose content is *unknown* to be either a male or a female leads to the sin of Brahmahatyā or the slaughter of a male Brahmin. The relevant Vedic texts are:

[1] अविज्ञातो वा एष गृह्यते, यदाग्रयणस्थाल्या गृह्णाति। वायव्येन जुहोति। तस्माद्भ्रूणेनाविज्ञातेन ब्रह्महा।

Visvarūpa, the famous commentator on Yājña-valkya Smṛti who is long anterior to Vijñānesvara, and who is actually referred to by the latter author in highly laudatory terms in the opening passage of his monumental commentary, is seen in the course of his erudite commentary to have left no stone unturned to establish the inter-relation between S'ruti and Smṛti, and he does it actually by citing on all possible occasions Vedic original texts for the Smṛtis. I shall now confine my attention to citing a few illustrations from the said commentary which almost seems to have been written with the set purpose of establishing the Vedic origin of the Smṛti. With regard to the application of Dharmas'āstra it is a known fact that the code of Yājñavalkya lays down the territorial limits of its application as identical with the place where the black antelope roams about fearlessly:

[1] *Taittirīya Saṁhitā*, 6, 5, 10.

[1] यस्मिन्देशे मृगः कृष्णस्तस्मिन्धर्मान्निबोधत ।

Three Vedic texts are treated as the origin of this rule. One is

[2] यज्ञो हि कृष्णः स कृष्णो भूत्वा चचार ।

For, a sacrifice is an antelope, and having become a black deer it roamed about. Another is a quotation from S'vetās'vatara.

[2] स कृष्णमृगोऽभवत् । स कृष्णमृगो भूत्वा पृथिवीमन्वचरत् । तमनु धर्मश्चचार ।

The sacrifice became a black deer. Having become a black deer it roamed over the earth, and Dharma followed suit. Another text is referred to as the song of the Bhāllavins, a school of the Sāmaveda which runs as follows:

[2] यतः पश्चात्सिन्धुर्विहरणी सूर्यस्योदयनं पुरः ।

The rule laid down by Yājñavalkya prohibiting the marriage of any male of the three higher castes with a woman of the S'ūdra caste, namely,

[3] यदुच्यते द्विजातीनां शूद्राद्दारोपसंग्रहः ।
नैतन्मम मतं यस्मात्तत्रात्मा जायते स्वयम् ॥

is described by Vis'varūpa to have been derived from the following two Brāhmaṇas:

[1] *Yājñavalkya Ācārādhyāya*, verse 2.
[2] *Vis'varūpa on Yājñavalkya*, Trivandrum Sanskrit Series, Vol. 74, page 8.
[3] *Yājñavalkya Ācārādhyāya*, Chapter 3, Verse 56.

[1] कृष्णवर्णीया रामा रमणायैवोपेयते इति ब्राह्मणवादः। तथा बह्वृचाः पठन्ति—पतिर्जायां प्रविशति गर्भो भूत्वेह मातरम्। तस्यां पुनर्नवो भूत्वा दशमे मासि जायते॥

'The dark-coloured damsel is approached merely for lust,' says the Brāhmaṇa. Similarly Bahvṛca recites : 'A husband enters the wife, becomes the womb, thus converting the wife into the mother, and of her he is born anew and is delivered in the tenth month.'

On the question whether the rules laid down in the Rājadharmaprakaraṇa are applicable to any person born of the Kingly caste or to a person who is actually the monarch, a Vedic text is referred to as restricting the scope of the Smṛti to the latter which is a typical illustration of the influence of the theory relating to the Vedic origin of Smṛtis upon the transformation of later law. The Vedic text runs thus :

[2] स मूर्ध्नो राजानमसृजत। स मूर्धन्यभिषिक्तो राजा भवेत्॥

He created the King from his head. He is therefore anointed in the head, and becomes a king. Here the word Rājan is restricted in its denotation to an anointed King.

[1] *Viśvarūpa on Yājñavalkya*, Trivandrum Sanskrit Series, Vol. 74, page 65.

[2] *Ibid.*, page 181.

Another instance may be drawn, from the law of partition, of a Vedic text which is cited by Mitākṣarā as prohibiting a thing ostensibly laid down by the Smṛtis. The Smṛti rule relating to the unequal division of heritage among brothers of different ranks prescribes certain minute additional fractions in favour of the elder known as *Uddhāra*. This unequal division is vehemently opposed by the author of Mitākṣarā principally on the ground of custom which is presumed to be warranted by a Vedic text which records an incident about the partition by Manu of his property among his sons equally, and without distinction, and therefore he infers the rule of law that unequal partition is condemned by S'āstras as by custom. The text itself is as follows :

[1] मनुर्जीवन् पुत्रेभ्यो दायं व्यभजत् ।

Manu while alive divided his assets among his sons equally. This text is also presumed to authorise a division of father's property during his lifetime which is described in the later legal language by the name of *Jīvadvibhāga*. This will ultimately be seen to lead to the theory of the right of sons by birth in the joint family property.

In the second chapter of Manu, a number of rules are laid down regulating the behaviour of a pupil towards his preceptor. The pupil must be

[1] *Tāittirīya Saṁhitā*, 3, 1, 9.

dressed in less costly clothes than the preceptor. He must rise from bed earlier and go to bed later. He ought not to reply to or converse with the preceptor while lying, sitting, dining, standing nor with his face turned the other side. While the preceptor is seated, he ought to stand up, advancing towards him when he stands, going to meet him if he advances, and running after him when he walks.

[1] आसीनस्य स्थितः कुर्यादभिगच्छंस्तु तिष्ठतः ।
प्रत्युद्गम्य त्वाव्रजतः पश्चाद्धावंस्तु धावतः ॥

With regard to the last portion of the Smṛti laying down the running after by the pupil, a Vedic source is discovered in a curious fashion. In the Cayana sacrifice, for the purpose of erecting a bird-like construction, earth is taken to the sacrificial spot by means of a man, a horse and an ass. The man goes first with the basket of earth, the horse is led next, and the ass follows thereafter. In this context, there is a general rule laid down that an inferior should always follow the footsteps of a superior, and this novel text is supposed to prescribe the procedure of a student's behaviour towards his teacher. The text itself is

[2] तस्माच्छ्रेयांसं यन्तं पापीयान् पश्चादन्वेति ।

[1] *Manu*, Chapter 2, Verse 196.
[2] *Tāittirīya Saṁhitā*, 5, 1, 2.

In the chapter relating to the conduct of a Snātaka, Yājñavalkya lays down :

[1] जलं पिबेन्नाञ्जलिना न शयानं प्रबोधयेत् ।
नाक्षैः क्रीडेन्न धर्मघ्नैर्व्याधितैर्वा न संवसेत् ॥

A Snātaka shall not drink water with the hollow of his palms. He shall not rouse a sleeping man. He should not play at dice, nor shall he intermingle with sinners or sickly persons.

With regard to the portion relating to the rousing of a man from slumber, Visvarūpa, the erudite commentator, qualifies the prohibition by adding the words अभिघ्नन् and कामकारेण, that is to say, one should not hit a sleeping man with a pointed edge or wilfully awaken him. The above two restrictions which are of course quite in consonance with common sense are imposed upon the text by tracing its origin to a Vedic text which reads as follows:

[2] तस्मादु ह स्वपन्तं धूरिव न बोधयेत् ।

Therefore one shall not awaken a sleeping man by inflicting pain.

A story is also narrated where a sleeping man is said to have been called by names, but when it was found to be of no avail, he was roused by a gentle pressure of the hand.

[2] तमेतैर्नामभिरामन्त्रयाञ्चकार, स नोत्तस्थौ, तं पाणिना पेषं प्रबोधयाञ्चकार ।

[1] *Yājñavalkya Ācārādhyāya*, Chapter 6, Verse 138.
[2] *Visvarūpa*, Trivandrum Sanskrit Series, Vol. 74, page. 109.

In another connection, in the chapter relating to the removal of impurity of materials, Yājñavalkya lays down the following rule:

[1] शुचि गोतृप्तिकृत्तोयं प्रकृतिस्थं महीगतम् ।

Pure is the water that can satisfy a cow, that is natural and that remains on earth.

An origin of this Smṛti is traced to a curious Vedic text which relates an interesting story.

[2] वाग्वै देवेभ्योऽपाक्रामत्, सा अपः प्राविशत्, ते देवा अद्भ्यो वाचमैच्छन्, तानापोऽब्रुवन्, यदस्माकं प्रजाभ्यो यदन्यजेभ्यो अशुभं तत् पावयध्वं ततो वाचं दास्याम इति तथेति देवाः प्राहुः ।

यो ह्यादित्यः स ब्रह्मयज्ञः सर्वा देवताः सहिताः अन्वहं ब्रह्मयज्ञपूताभिः रश्मिभिः पावयेत्, तस्मादेव अहनि शुद्धाः शुद्ध्यै कल्प्यन्ते, तस्माद्यद्यन्मीमांस्यं स्यात्, तत्तदद्भिः स्पृशेत् शुच्येव भवति ॥

The Goddess of speech strayed away from the Gods. She entered the waters. The Gods desired the waters to deliver the Goddess of Speech. To them, the waters replied "Whichever staint may accrue unto us either from men or from other beings you shall purify. Then we shall deliver the Goddess of speech." "Alright," said the Gods.

The sun is the Brahmayajña. He purifies with his rays which are rendered sacred by Brahmayajña

[1] *Yājñavalkya Ācārādhyāya*, Chapter 8, Verse 192.

[2] *Viśvarūpa*, Trivandrum Sanskrit Series, Vol. 74, page 131.

daily, all the Gods together. Therefore it is that during the day pure things are calculated to create purity. So whichever is doubted to be impure, one shall wash with water. It actually becomes pure.

As an instance of a Smṛti rule traceable to an Arthavāda origin, may be cited the text of Yājñavalkya:

[1] महोक्षं वा महाजं वा श्रोत्रियायोपकल्पयेत् ।

'A householder ought to serve a learned man with a bull or a goat,' the corresponding Arthavāda text occurring in the Veda being

[2] तद्यथैव अदो मनुष्यराज आगते अन्यस्मिन् वा अर्हति उक्षाणं वेहतं वा क्षदन्ते ।

Just as in this world when a great man is come or any other deserving person, they kill a bull or a barren cow.

An illustration of the same principle is to be found in the text of Yājñavalkya in the Snātaka Dharma Prakaraṇa which says

[3] न भार्यादर्शनेऽश्नीयात् ।

which has been interpreted differently by two different commentators. According to Mitākṣarā, it prohibits eating on the part of the husband in the presence of his wife. According to Vis'varūpa, it

[1] *Yājñavalkya Ācārādhyāya*, Chapter 5, Verse 109.
[2] *Mīmāṁsā Kaustubha*, 1, 3, 1.
[3] *Yājñavalkya Ācārādhyāya*, Chapter 6, verse 131.

prohibits the presence of the husband at the time of the wife's taking her meals. In the latter sense the text is traced to the following Arthavāda.

[1] तस्मादिमा मनुष्याः स्त्रियस्तिर इव पुंसो जिघत्सन्ति ।

'Therefore these women desire to devour men, like beasts of prey.'

Certain rules of the Smṛti texts are deemed to be anticipated or presumed by Vedic texts by way of necessary implication. For example, there is no actual Vedic text commanding the performance of the initiation ceremony, but it is necessarily involved in the text which lays down that one ought to study Vedas, namely:

[2] स्वाध्यायोऽध्येतव्यः ।

With regard to the performance of the Saṁskāra known as marriage and with regard to the procreation of a son, there is no express Vedic text. But both the ideas which are dealt with in Smṛti texts like

[3] लक्षण्यां स्त्रियमुद्वहेत् and [4] ऋतावुपेयात् ।

"One ought to marry a beautiful woman," and "One ought to approach his wife in Ṛtu" are described as necessarily presumed by the Vedic text:

[1] *Viśvarūpa*, Trivandrum Sanskrit Series, Vol. 74, page 106.

[2] *Tāittirīya Āraṇyaka*, 2, 15, 1.

[3] *Yājñavalkya Ācārādhyāya*, Chapter 3, Verse 52.

[4] *Ibid.*, Verse 79.

[1] जातपुत्रः कृष्णकेशोऽग्नीनादधीत ।

Of Smṛtis derived from Vedic Mantras, the following may be cited as illustrations:

1. न पचेदन्नमात्मने[2] ।

"One shall not cook food for his own sake." derived from the following Mantra [3]मोघमन्नं विन्दतेऽप्रचेताः । 'A miser obtains ineffective food.'

2. The Smṛti rule that one shall construct a water-house in a desert, derived from धन्वन्निव प्रपा असि । "Thou art like a water house in a desert" occurring in the following Mantra.

[4]प्र ते यक्षि प्र त इयर्मि मन्म भुवो यथा वन्द्यो नो हवेषु ।
धन्वन्निव प्रपा असि त्वमग्न इयक्षवे पूरवे प्रत्न राजन् ॥

3. दाक्षायणी ब्रह्मसूत्री[5] etc.

This text of Yājñavalkya commands a Snātaka to wear gold and sacred thread. The corresponding Mantra text is as follows:

[6]न तद्रक्षांसि न पिशाचास्तरन्ति देवानामोजः प्रथमजं ह्येतत्, यो बिभर्ति दाक्षायणं हिरण्यम् ।

[1] *Bhāṭṭa Dīpikā*, 2, 3, Adhikaraṇa 3.
[2] *Yājñavalkya Ācārādhyāya*, Chapter 5, Verse 104.
[3] *Taittirīya Brāhmaṇa*, 2, 8, 8.
[4] *Ṛg Veda*, 7, 5, 32, 1.
[5] *Yājñavalkya Ācārādhyāya*, Chapter 6, Verse 133.
[6] *Viśvarūpa*, Trivandrum Sanskrit Series, Vol. 74, page 106.

Neither the demons nor the evil spirits cross it, for this is the first born vitality of Gods. He that wears gold produced by Dakṣa, etc.

In the chapter dealing with the observance of holidays with reference to the study of Vedas, Yājñavalkya lays down that when a Paśu intervenes between the preceptor and the pupil, the studies ought to be suspended for one day and night. The word paśu in the above text has been interpreted to mean a goat by reason of the Mantra text reciting 'a goat is thy victim'. The Smṛti text and the corresponding Mantra are respectively as follows:

[1] पशुमण्डूकनकुलश्वाहिमार्जारसूकरैः ।
कृतेऽन्तरे त्वहोरात्रं शक्रपाते तथोच्छ्रये ॥ and

[2] मेषकस्ते पशुः ।

In the chapter relating to the removal of the impurities of substances, Yājñavalkya declares that roads are purified by the rays of the moon and the sun and by the wind.

[3] पन्थानश्च विशुध्यन्ति सोमसूर्यांशुमारुतैः ।

An origin of this rule is to be seen in the following Mantra Varṇa:

[4] अग्निः पवित्रं स मा पुनातु वायुः सोमः सूर्य इन्द्रः ।

[1] *Yājñavalkya Acārādhyāya*, Chapter 6, Verse 147.

[2] *Viśvarūpa*, Trivandrum Sanskrit Series, Vol. 74, page 112.

[3] *Yājñavalkya Ācārādhyāya*, Chapter 8, Verse 194.

[4] *Viśvarūpa*, Trivandrum Sanskrit Series, Vol. 74, page 132.

In the Vyavahāra portion when dealing with the succession to the mother's estate, Yājñavalkya lays down :

[1] मातुर्दुहितरः शेषं ऋणात्ताभ्य ऋतेऽन्वयः ।

Daughters shall take the residue of a mother's estate after the discharge of debts, and in their default, the family takes.
The word family here means the male issue of the deceased woman. This text is supposed to represent an idea derived from the following Mantra :

[2] न जामये तान्वो रिक्थमारैक् चकार गर्भं सनितुर्निधानम् ।
यदी मातरो जनयन्त वह्निमन्यः कर्ता सुकृतोरन्य ऋन्धन् ॥

There are also certain ideas in the Smṛtis borrowed from Vedic texts, but in a different form from that in the Vedas. For example, a Vedic text recites

[3] मलवद्वाससा न संवदेत ।

One ought not to speak to a woman during menses. In the Vedic context in which it occurs, the prohibition is what is technically known as *Kratvartha*; that is, a violation of this prohibition goes to the root of the act and vitiates the sacrifice itself with the result that no sacrifice can be deemed to have taken place if the rule is violated, and that the benefit

[1] *Yājñavalkya Vyavahārādhyāya*, Chapter 8, Verse 117.
[2] *Ṛg Veda*, 3, 2, 5, 2.
[3] *Taittirīya Saṁhitā*, 2, 5, 5.

contemplated by the performance of the sacrifice will not accrue. The same prohibition is also laid down in the Smṛtis, but with the distinction that the prohibition is made *Puruṣārtha*; that is to say, a transgression of the rule will entail the accrual of sin irrespective of any connection with any sacrifice.

As an instance of a Smṛti text based on *Nyāya* may be cited the text of Yājñavalkya.

[1] कर्म स्मार्तं विवाहाग्नौ कुर्वीत प्रत्यहं गृही ।

For, it stands to reason that all acts in which the husband and the wife are associated should be performed in the fire kindled by them both.

Some Smṛti rules can be traced to a double source. For example, the famous Smṛti text [2] अष्टका: कर्तव्या: which is the actual subject for discussion in the Smṛtyadhikaraṇa of Pūrva Mīmāṁsā is traced by the author of Tantra Vārtika both to a Mantra and an Arthavāda which are respectively as follows:

[3] यां जनाः प्रतिनन्दन्ति रात्रिं धेनुमिवायतीम् ।
संवत्सरस्य या पत्नी सा नो अस्तु सुमङ्गली ॥
अष्टकायै सुराधसे स्वाहा ।

and

[4] एषा वै संवत्सरस्य पत्नी यदेकाष्टका ।

[1] *Yājñavalkya Ācārādhyāya*, Chapter 5, Verse 97.
[2] *Āśvalāyana Gṛhyasūtra*, 2, 4, 4.
[3] *Ekāgnikāṇḍa*, *Praśna* 2, Mantra 30.
[4] *Taittirīya Saṁhitā*, 7, 4, 8.

The Smṛti permitting polygamy but prohibiting polyandry is traced to the following Vedic texts.

[1] तस्मादेकस्य बह्वयो जाया भवन्ति । नैकस्यै बहव: सहपतय: ।

Therefore for one man there are several wives, but for one woman there are not serveral joint husbands, and

[2] यस्मै मां पिता दद्यात् नैवाहं तं जीवन्तं हास्यामि ।

"Him to whom my father has given me, I shall never forsake while he is living."
This latter text is also often mentioned as authorising the practice of Niyoga for which a warrant is also found in the following Mantra.

[3] को वां शयुत्रा विधवेव देवरं मर्यं न योषा कृणुते सधस्थ आ ।

Of Smṛti texts admittedly based on false reasoning and an incorrect understanding of the rules of interpretation and consequently deemed to be unauthoritative, I shall give instances later. I hope this collection of Smṛtis and their corresponding Vedic

[1] *Viśvarūpa*, Trivandrum Sanskrit Series, Vol. 74, page 74. Compare *Taittirīya Saṁhitā*, 6, 6, 4.
यदेकस्मिन् यूपे द्वे रशने परिव्ययति तस्मादेको द्वे जाये विन्दते यन्नैकां रशनां द्वयोर्यूपयोः परिव्ययति तस्मान्नैका द्वौ पती विन्दते ।

[2] *Viśvarūpa*, Trivandrum Sanskrit Series, Vol. 74, page 74.

[3] *Ibid.*

original sources will throw considerable light on the question of the origin of the Smṛtis. As to whether the theory of a Vedic origin of the entire Smṛti literature represents the correct view that stands the test of searching criticism, I shall allow the reader to draw his own conclusion.

THIRD LECTURE

In the last lecture I have dealt with the general fiction assumed by the Mīmāṁsakas that every rule of positive law, morality or religion embodied in the Smṛti literature is clearly traceable to one or more Vedic originals belonging to the Mantra, Arthavāda or supplemental Vidhi portion. But nobody who has a critical eye will fail to observe the fundamental truth on which the authority of a Smṛti rule rests, namely, the fact that it had been countenanced by the sense of the majority of the orthodox section professing the Vedic faith, although in theory, the recognition of a custom, however wide it may be, will not by itself be capable of imparting validity to a Smṛti rule giving effect to it, but will only raise a presumption of the existence of a S'ruti text in its support which is beyond the eye of the ordinary observer. Therefore, whether a corresponding S'ruti text is available or not in the extant Vedic literature, the truth is that a Smṛti rule is of binding authority by virtue of its acceptance and recognition by the community at large. That the Mīmāṁsā scholars themselves were fully conscious of the fact that their theory as to the Vedic origin of Smṛtis was in most cases a mere fetish is fully borne out by the limitations by which

they seek to restrict the universality of this fiction. The several inroads made upon the theory of the Vedic basis of Smṛtis illustrate the different degrees in which the fiction of Vedic origin is recognised in its application to different circumstances.

The first exception to the rule that all Smṛtis are based on Vedas is illustrated by the Mīmāṁsakas in the *Audumbarādhikaraṇa.*[1] The discussion relates to a case of conflict between an express S'ruti and an express Smṛti. In such a case, is the theory of the Vedic basis to be given effect to, or rejected *in toto*, or accepted in a qualified manner? The answer to this question varies with different authors. There is a sharp difference of opinion on the point between S'abarasvāmin, the author of Bhāṣya and Kumārila Bhaṭṭa, the author of Vārtika. In order to elucidate the difference of opinion between these two great Mīmāṁsā scholars, it is necessary for us to enter into the details of the discussion which occasioned it. But at the outset it will be convenient to forecast that the inclination of the author of Vārtika is generally in favour of giving as extended an application as possible to the fiction of the S'ruti origin of Smṛtis. The principal text about which the discussion turns is the Smṛti text [2] औदुम्बरी सर्वा वेष्टयितव्या ।

[1] *Jaimini's Mīmāṁsā*, I, 3, Adhikaraṇa 2.

[2] *Jaimini's Mīmāṁsā*, 1, 3, Adhikaraṇa 2. *Cf. Drāhyāyaṇa, S'rauta Sūtra*, 5, 2, 1.

'The whole of the sacrificial pillar made of Udumbara wood must be covered.' With regard to the actual reading of the text, Khaṇḍadeva, the author of Mīmāṁsā Kaustubha is of opinion that the correct reading is [1] औदुम्बरी परिवेष्टयितव्या । and not [1] औदुम्बरी सर्वा वेष्टयितव्या । as quoted in other Mīmāṁsā treatises. A conflict is referred to between this Smṛti text and an express S'ruti text, [1] औदुम्बरीं स्पृष्ट्वोद्गायेत् । which means 'The Udgatṛ priest ought to chant, touching the sacrificial Udumbara pillar'. The conflict is that by the Smṛti the whole of the pillar ought to be covered, and if that is followed it would not be possible for the priest to touch the pillar with his hand, and consequently the S'ruti rule has necessarily to be violated. In such a case, are we to presume an originating S'ruti text for the Smṛti under question as in the case of *Aṣṭakāsmṛti* leading to the inference of two conflicting Smṛtis so as to result in an option or *Vikalpa* tainted with the eight flaws known to Mīmāṁsakas; or, are we to conclude that the Smṛti rule has no basis in the S'ruti, and that its authority is completely negatived by the express S'ruti text to the contrary? The conclusion is in favour of the latter alternative, because the authority of Smṛtis is only derivative, and when an original authority to the contrary is available, the expectancy of the Smṛti rule for a

[1] *Jaimini's Mīmāṁsā*, 1, 3, Adhikaraṇa 2. *Cf. Drāhyāyaṇa, S'rauta Sūtra*, 5, 2, 1.

Vedic basis disappears. In other words, when there is a conflict between a S'ruti and a Smṛti the former prevails, and the latter is abandoned as at best it will only suggest a S'ruti by inference. This is the view put forward by S'abarasvāmin. The author of Vārtika in the first place shows that there is no real conflict between the S'ruti and Smṛti texts under consideration, for it is possible to reconcile both by adopting the interpretation that the whole of the sacrificial pillar should be covered with the exception of a small space left uncovered for the purpose of touching. In the second place, there is no warrant for supposing that the expectancy on the part of the Smṛti for an original Vedic source becomes extinct as soon as an apparently conflicting Vedic text makes its appearance. Thirdly, the acceptance of such a theory will, when carried to its logical consequence, present a formidable difficulty in explaining the admitted existence of conflicting S'ruti texts as

[1] उदिते जुहोति and [2] अनुदिते जुहोति or [3] अतिरात्रे षोडशिनं गृह्णाति and [3] नातिरात्रे षोडशिनं गृह्णाति ।

One S'ruti text says that *Homa* should be performed after sunrise, another says before sunrise. One S'ruti text says that the *Ṣodas'i* vessel ought to be utilised in the *Atirātra* sacrifice, another says it

[1] *Aitareya Brāhmaṇa*, 5, 25, 6.
[2] *Tāittirīya Brāhmaṇa*, 2, 1, 2.
[3] *Bhāṭṭa Dīpikā*, 10, 5, 12.

ought not to be. When such admittedly conflicting texts of S'ruti are available, is it far-fetched to presume an original Vedic source for the Smṛti rule enjoining the total covering of the sacrificial pillar existing side by side with a S'ruti rule which directs the contrary? Hence the only possible answer that could be suggested under the circumstances is that there is a corresponding S'ruti text for the Smṛti rule under consideration, but that it ought not to be acted upon until the original source is actually found out. It will thus be seen that according to the view of Vārtikakāra, the theory of the validity of Smṛtis remains unviolated while the evil resulting from an admission of its binding character is effectively prevented. How he manages to harmonise the theory of its authority with the practical consequence aimed at by the Bhāṣyakāra is as follows: Authority is of two kinds. A text may be authoritative in the sense that it speaks the truth. There is another sense in which a text may be said to be authoritative. In this latter sense, *authoritative* and *binding* are convertible terms. In the light of the above two significations it is quite easy to comprehend that a Smṛti rule conflicting with a S'ruti text is authoritative in the one sense and not in the other, and that the generalisation about the authority of the Smṛtis has reference to the first of the two meanings in which the word authority is capable of being construed as stated above. Lastly, the Vārtikakāra objects to

the citation of this text itself as exemplifying a Smṛti of an unknown Vedic source, for he is at no loss to spell out an express text from the vast mass of Vedic literature corresponding to the Smṛti in question. The S'ruti text on which he declares the Smṛti to have been founded belongs to the *S'āṭyāyanis'ākhā* and runs as follows:

[1] तामूर्ध्वदशेन परिवेष्टयति ।

and this text, he says, is actually cited as the source of the Smṛti by Jaimini in his Chāndogya. From the above discussion it may be gathered that the intention of the Vārtikakāra is that the text cited in the Bhāṣya is not properly a case arising for consideration, and that if at all anybody succeeds in citing a Smṛti text which is necessarily conflicting with an express S'ruti text, the authority of the Smṛti ought to be restricted to the narrower of the two significations pointed out above, so that in effect the text is deprived of its binding character according to both the theories.

In the same discussion another text is cited in the Bhāṣya as standing exactly on the same footing as the one already considered. This is the Smṛti text which says:

[2] अष्टाचत्वारिंशद्वर्षाणि वेदब्रह्मचर्यम् ।

[1] *Tantravārtika*, 1, 3, Adhikaraṇa 2.
[2] *Bodhāyana Dharma Sūtra*, 2, 1.

'One ought to observe studentship of Vedas for forty-eight years.' It is humorously remarked by S'abarasvāmin that this text has been composed and interpolated by a person in order to conceal his impotency. In the same way, on numerous occasions, S'abarasvāmin indulges in humorous remarks which seem to shake the very foundation and authenticity of the major portion of the Smṛti literature. In the case of another Smṛti text which also finds a place in the same discussion, namely,

[1] क्रीतराजको भोज्यान्नः ।

'The food of a sacrificer, who has bought Soma deserves to be eaten,' he says that the permissive Smṛti rule is the outcome of famine and starvation. The rule of Smṛti which says that the Adhvaryu is entitled to the cloth used at the Vaisarjana Homa,

[2] वैसर्जनहोमीयं वासोऽध्वर्युर्गृह्णाति ।

is in his opinion due to the imagination of an avaricious priest. The same reason is also attributed to the text:

[3] औदुम्बरी सर्वा वेष्टयितव्या ।

The advanced notions entertained by S'abarasvāmin with regard to the authorship of such of the Smṛtis as did not appear to him reasonable are apt to give

[1] *Tantravārtika*, Adhyāya 1, Pāda 3, under Sūtra 3.
[2] *Jaimini's Pūrva Mīmāṁsā*, 1, 3, Adhikaraṇa 3.
[3] *Ibid.* Adhikaraṇa 2.

a handle to modern oriental scholars of the West and to those trained in their school who rarely look upon our ancient literature with anything but a suspicious eye and who have actually suggested that the S'āstras represent the outcome of a scheming head on the part of the Brahmin priesthood to hold the illiterate masses in abject submission and consternation. The heterodoxy of the several views held by the Bhāṣykāra necessitated a reactionary move to place the Smṛti codes beyond all suspicion, which is chiefly represented by one of the greatest orthodox champions named Kumārila Bhaṭṭa, the famous author of *Tantravārtika.* His attitude is not merely that of being contented with a contradiction of the critical views of Bhāṣyakāra, but one of aggressive challenge thrown to the Bhāṣyakāra to refute the broad proposition that all Smṛtis are based upon S'rutis. Not one instance is left unquestioned, of a Smṛti whose S'ruti source is held by the Bhāṣyakāra to be unknown. Kumārila Bhaṭṭa is able to discover texts from the unexplored regions of the Vedic literature to substantiate the Smṛti rules of which the Bhāṣyakāra is not able to trace the S'ruti source, and this process of discovering fresh S'ruti texts from the unexplored regions increases with the later Mīmāṁsakas. In fact Khaṇḍadeva comes forward with an inexhaustible store of Vedic texts which have escaped the scrutiny of the Vārtikakāra himself.

Now to return to the discussion of the Smṛti rule enjoining bachelorhood for forty-eight years. This certainly conflicts, as expressed by S'abarasvāmin, with the text of S'ruti

[1] जातपुत्रः कृष्णकेशोऽग्नीनादधीत ।

He ought to kindle the sacred fires, of whom a son is born and hairs are dark. The kindling of the sacred fire is the duty of a man who has entered the married life. The lengthy studentship prescribed by the Smṛti rule will in all probability render a person too aged to come within the definition given in the S'ruti text. As a result of this conflict the Smṛti rule will have to give way, and is therefore of absolutely no authority. This is the view held by the Bhāṣyakāra. As against this, the author of Vārtika holds that it is wrong to suppose there is any conflict between the two texts. It may be suggested that studentship for forty-eight years is intended for those who are either lame or blind, or otherwise disqualified to enter on the married life, and at the same time are incapable of becoming a perpetual Brahmacārin or an ascetic by reason of lack of self-control; and consequently there is no real conflict between the two texts. As a matter of fact, an express text from the Atharvaveda is pointed out in support of the rule laid down in the Smṛti.

[1] *S'ābarabhāṣya*, 1, 3, Adhikaraṇa 2.

With regard to the Smṛti text [1] क्रीतराजको भोज्यान्नः, we have already observed that in the opinion of Bhāṣya, it is not authoritative as the inference of the Vedic text in support of it is impeded by the express text of S'ruti:

[2] न दीक्षितस्यान्नमश्नीयात् ।

One shall not eat the food of a sacrificer. The conflict is brushed aside by the Vārtikakāra who says that the prohibition relates to a sacrificer who performs a sacrifice for expiation, and that the permissive rule refers to a sacrifice performed for the attainment of heaven. After all the Smṛti rule is a permissive injunction. Nobody is compelled to take the food of a sacrificer, but when he does so there are three stages at which his food is permitted by the S'āstras. Strictly speaking, when the *Agnīṣomīyasaṁsthā* which is a subsidiary to the *Jyotiṣṭoma* is performed, the prohibition loses its ground. Prior to that, there are two occasions at which the taking of a sacrificer's food is permitted. One is when the *Vapā* is offered in the fire, and the other is when the *Soma* is bought. The cumulative effect of all texts has been described to be that there are three stages at which a person is allowed to take a sacrificer's food, and that the greater the adversity, the earlier is the stage at which it is permitted. With regard to the distinction

[1] *Tantravārtika*, Adhyāya 1, Pāda 3 under Sutra 3.
[2] *Cf. Āpastamba S'rauta Sūtra*, 10, 15, 15.

that the prohibition relates only to the taking of food at a sacrifice performed for expiation, the author of Vārtika finds no difficulty in discovering a source from the Atharvaveda to support the same, namely,

[1] तस्माद्दीक्षितस्य विज्ञातस्य क्रीतराजकस्य भोग्यं भवति ।

Therefore, of a sacrificer known (to perform the sacrifice for heaven) who has bought the Soma, food is eatable.

Another case of conflict between S'ruti and Smṛti, and of the overriding of the latter by the former is mentioned in the following verse:

[2] अर्धास्तमित आदित्ये प्रारभ्यार्क्षविभावनात् ।
जपः स्मृत्युदितस्त्यक्तो विरोधादग्निहोत्रिभिः ॥

By a Smṛti rule, Japa is laid down from sunset up to the appearance of stars in the sky. By the S'ruti, the Agnihotra is to be performed in the evening soon after sunset. The conflict between the two texts is reconciled by treating the Smṛti rule as overruled by the S'ruti text, in its application to performers of Agnihotra.

Thus far we have dealt with cases of apparent or real conflict between a S'ruti and a Smṛti text, and the limitation that has to be laid on the theory of a

[1] *Mīmāṁsā Kaustubha*, Adhyāya 1, Pāda 3, page 23.
[2] *Vis'varūpa on Yājñavalkya, Ācārādhyāya* under S'loka 7.

Vedic basis of the Smṛtis. Now we shall refer to some other circumstances which justify the denial of authority or of binding character to certain Smṛtis. It is not all Smṛtis that stand in need of a Vedic source. A Vedic basis is presumed only in those cases where an invisible effect or an effect not accountable to any visible, tangible cause is deemed to be produced. Some Smṛtis are *dṛṣṭārtha*, that is, are intended to produce a visible result; and, some are *adṛṣṭārtha*, that is, are intended to produce an invisible result. The ultimate objects aimed at by the former class of Smṛtis are *Artha* and *Kāma*, that is, wealth and pleasure; of the latter are *Dharma* and *Mokṣa*, that is, virtue and salvation. Even in the case of Adṛṣṭārtha smṛtis, where a particular text is obviously due to interested causes or motives like avarice, ignorance, etc., it is not necessary to presume a Vedic origin for it. The rule entitling the Adhvaryu priest to take away the cloth used at the Vaisarjanahoma, and the rule enjoining the total covering of the sacrificial pillar by cloth may be traced to the scheming of a covetous priestcraft. If this is a real test to be applied to all Smṛti rules, it is apprehended that most of the Smṛti injunctions chiefly belonging to the *Dāna* and *Prāyaścitta* chapters will have to be thrown overboard, for it is not clear where the line of demarcation is to be drawn between texts due to interested motives and texts free from the taint. At best, the statement of

Bhāṣyakāra can only serve the purpose of giving caution against the acceptance of interpolations as genuine, merely by reason of their having been dexterously interwoven with the genuine Smṛti literature. Some other Smṛtis may be due to a misapplication of the rules of interpretation. One test of identifying this class of Smṛtis is to find out whether the conclusions accepted by them correspond to the objections raised and met by the Pūrva-Mīmāṁsā. If the *Pūrvapakṣa* of any adhikaraṇa in the Pūrva Mīmāṁsā accords with the theory set out as conclusive in Smṛti texts, such Smṛti texts must be deemed to be the creature of an incorrect understanding of the rules of Exegesis, and consequently possess no authority. All the observations made with regard to Smṛtis are equally applicable to Kalpa-sūtras; for, although in common parlance Kalpa-sūtras are not ordinarily known to be Smṛtis, they come under the denotation of the term Smṛti from the strict s'āstraic point of view.

A few instances may here be conveniently noticed, of Kalpa-sūtras based upon arguments advanced by the objector in the science of Mīmāṁsā. In the chapter relating to the sacrifice known as *Agnīṣomiya pas'u*, as soon as the *Pas'u* is sacrificed, a sacrifice of *Puroḍās'a* (a sacrificial oblation made of ground rice and offered in Kapālas or vessels) is enjoined as a subsidiary to the Pas'uyāga to propitiate the same God as in the Pas'uyāga, on the

principle generally recognised that the God in whose honour an animal sacrifice is performed is also the God for the subsidiary Puroḍāśa sacrifice.

यद्देवत्यः पशुः तद्देवत्यः पुरोडाशः

Sacrifices are generally of two kinds; some are models, some are copies. The former are technically known as *Prakṛtis*, and the latter as *Vikṛtis*. The former are three in number, *Darśapūrṇamāsa* or the New Moon and Full Moon sacrifice, *Jyotiṣṭoma* and *Agnīṣomīya-paśu*. As between themselves, the last is to a certain extent modelled on the first. All the other sacrifices are merely copied from these three originals. With reference to the distinction in the material offered at the sacrifice, all sacrifices whether Prakṛti or Vikṛti may be divided into three classes. Some are known as *Iṣṭis*, some as *Paśu-yāgas*, and some as *Somayāgas*. Sacrifices in which Puroḍāśa is offered are called Iṣṭis, and they are all modelled upon the Darśapūrṇamāsa sacrifice. Sacrifices in which animals are victimised, and offered to the Gods are called Paśu-yāgas, and they are all modelled upon the Agnīṣomīya-paśu sacrifice. All other sacrifices are called Soma-yāgas, and they are all modelled on the Jyotiṣṭoma sacrifice. The result of the acceptance of the relationship of model and copy between sacrifices is that the latter derives all its subsidiaries from the former in the absence of any express text in the context to the contrary.

This rule by which the subsidiaries of the original are, as it were, inherited by the copy sacrifices is termed in Mīmāṁsā treatises as the principle of *Atides'a*. *Atides'a* and *Upades'a* are two antithetic words, the former referring to the extension of an idea by analogy, the latter to an actual injunction by means of express words. In the Savanīya Pas'u, a Kalpa sūtra states [1] स कृताकृत: which is a typical illustration given by Mīmāṁsakas of a Smṛti text based on an imperfect understanding of exegetical principles. As Savanīya Pas'u is a sacrifice in which an animal is offered, it is the Vikṛti or copy of Agnīṣomīya Pas'u. As in the latter, a subsidiary Puroḍās'a sacrifice is performed, after the animal is sacrificed, the same subsidiary sacrifice is imported in the Savanīya Pas'u also by the principle of Atides'a. With regard to this subsidiary Puroḍās'a sacrifice, the Kalpa sūtra states स कृताकृत: meaning that its performance is optional, and this is exactly the view suggested by the objector in the Twelfth chapter of Pūrva Mīmāṁsā. The argument on which the objection is based is that the reason assigned for the performance of the subsidiary Yāga in the original is found to be wanting in the Vikṛti, and by the application of the maxim *Cessante Ratione Cesset et lex*, it follows that it may be dispensed with in the latter. The rationale on which the

[1] *Āpastamba S'rauta Sūtra,* 13, 1, 15.

performance of the subsidiary is based in the Prakṛti has been described to be the filling up of gaps in the material offered at the sacrifice; for, in the original Pas'u Yāga, the animal is not offered in its entirety. Certain parts of it are cut off from the rest and offered at the sacrifice. Therefore the material offered becomes disconnected, to unite which into a harmonious whole the pasty Puroḍās'a is offered. So far as the Savanīya Pas'u is concerned, whether the Puroḍās'a Yāga is imported by Atides'a or not, there is a Pas'u Puroḍās'a prescribed in the context which by itself would suffice for the purpose of filling up the gaps in the sacrificial material; and, the reason for the importation of the subsidiary sacrifice having thus disappeared, the subsidiary imposed by the principle of Atides'a may either be performed or rejected at the option of the sacrificer, which is the *prima facie* objection raised in the Mīmāṁsā works and upheld by the Kalpa sūtra in question. But the conclusion arrived at by the Mīmāṁsakas emphatically refutes this position. The reason, namely, that of filling up the gaps suggested in the Prakṛti Yāga is merely an Arthavāda intended to eulogise the God to whom the sacrifice is made, and in reality, it is no reason for the rule. Hence, irrespective of the compulsory Pas'u Puroḍās'a sacrifice enjoined in the context, the subsidiary Puroḍās'a Yāga must be performed in the same way as in the Agnīṣomīya Pas'u.

An illustration of a text due to misapplication of logic may be drawn from Āpastamba. A S'rauta Sūtra of Āpastamba recites

[1] यावद्यूपं वेदिमुद्धन्ति ।

This text occurs in the chapter relating to Ukthya which is a development of the Jyotiṣṭoma sacrifice. In the model sacrifice on which Ukthya is based, there is a direction that eleven sacrificial pillars ought to be planted crosswise so that each of the pillars may rest half of it within the sacrificial altar and the other half outside the altar. The text laying down this direction is

[2] तत्रार्धमन्तर्वेदि मिनोति, अर्धं बहिर्वेदि ।

By the principle of Atides'a, the eleven sacrificial pillars are imported into the Ukthya sacrifice. But with regard to their location there is an express text in the context prohibiting the establishment of pillars crosswise in the sacrificial altar as in the Prakṛti Yāga. It therefore follows that the first Yūpa is to be posted at the eastern extremity of the altar, just a few inches from the sacrificial fire, and the other Yūpas are to be posted eastward of the said pillar. In these circumstances, a doubt is raised whether the sacrificial altar whose dimensions are prescribed by other rules ought to be extended

[1] *Āpastamba S'rauta Sūtra*, 22, 10, 17.
[2] *Maitrāyaṇī Saṁhitā*, 3, 9, 4.

in the eastern direction so as to cover the space occupied by all the pillars, or whether the sacrificial altar needs no extension by reason of the sacrificial posts. The former view proceeds on the assumption that a sacrificial altar merely serves the purpose of a resting place to the sacrificial pillar, and is therefore a subsidiary to the same. [1] This view is repudiated by the Mīmāṁsakas on the ground that the only text which apparently lends some support to this position, namely, तत्रार्धमन्तर्वेदि मिनोति, अर्धं बहिर्वेदि is not to be taken as laying down that the altar is a subsidiary to the pillar, but that the pillar ought to be posted at a particular place half of which happens to fall within the altar. Hence the view given effect to by Āpastamba in his aphorism, [2] यावद्यूपं वेदिमुद्धन्ति, one ought to construct the sacrificial altar to cover the entire number of Yūpas, accords with the objector's view in the Pūrva Mīmāṁsā, and is therefore erroneous.

Another text of Āpastamba suffers the same treatment at the hands of the Mīmāṁsakas. It recites

[3] जाघनीभिश्च पत्नीः संयाजयन्ति ।

They perform *Patnīsaṁyāja* with the aid of animals' tails. This text occurs in the context of the *Pas'vekādas'inī* sacrifice which is a Vikṛti of

[1] *Jaimini's Mīmāṁsā*, 3, 7, Adhikaraṇa 6.
[2] *Āpastamba S'rauta Sūtra*, 22, 10, 17.
[3] *Āpastamba S'rauta Sūtra*, 14, 7, 11.

Agnīṣomīya Pas'u which is itself based on the model of Payoyāgas which form a part of the Dars'a-pūrṇamāsa sacrifice. In the last sacrifice the Patnī-saṁyāja is enjoined with the aid of an animal's tail or ghee at the option of the sacrificer, by the text.

[1] जाघन्या पत्नीः संयाजयन्ति आज्येन वा ।

By the principle of Atides'a the choice of materials would have been directly imported into the Agnīṣomiya Pas'u sacrifice but for an express text in its context restricting the material to be offered at the Patnīsaṁyāja to the animal's tail. Therefore, the Patnīsaṁyāja sacrifice is intended not as a *Saṁskāra karma*, or a purificatory ceremony of the tail, but as a direct subsidiary to the principal sacrifice. If the Patnīsaṁyāja sacrifice be held to be a purificatory ceremony or *pratipatti* of the animal's tail, it would follow that there ought to be performed as many Patnīsaṁyājas as there are goats' tails in the sacrifice. [2] But the view is upheld by the Mīmāṁsakas that Jāghanī is a subsidiary to the Patnīsaṁyāja, and not vice versa, with the result that in the Agnīṣomīya Pas'u sacrifice, only one Patnīsaṁyāja is performed with the aid of one Jāghanī, and as the Pas'vekādasinī is merely modelled upon Agnīṣomīya Pas'u, by the application of Atides'a, only one Patnīsaṁyāja has to be performed

[1] *Āpastamba S'rauta Sūtra*, 3, 8, 10.
[2] *Jaimini's Mīmāṁsā*, 12, 4, 6.

with the aid of one Jāghani in the Pas'vekādas'inī as well. It will therefore be seen that the view represented by Āpastamba in the Kalpa sūtra

[1] जाघनीभिश्च पत्नीः संयाजयन्ति ।

accords with the objection point of view in the Pūrva Mīmāṁsā, and is therefore erroneous and not binding.

Another illustration of the same principle is to be found in the following text:

[2] अविशेषादुभौ वा ।

The Dars'apūrṇamāsa sacrifice is an aggregate of six sacrifices, three of which go by the name of *Dars'a*, and the other three by the name of *Pūrṇamāsa*. The three sacrifices belonging to the Dars'a set are *Āgneya*, *Agnīṣomīya* and *Upāṁs'uyāja*. The three belonging to the other set are *Agnīṣomīya*, *Indradadhi*, and *Indrapayas*. The material offered at Āgneya and Agnīṣomīya sacrifices is the *Puroḍās'a* or the ball of flour made of rice or any other grain heated and boiled in Kapālas. Prior to the offering in the fire, the Puroḍās'a used at the Āgneya sacrifice is directed to be divided into four quarters. [3]A question arises whether the division into quarters is to be made of the Puroḍās'a used

[1] *Jaimini's Mīmāṁsā*, 12, 4, 6.
[2] *Kātyāyana S'rauta Sūtra*, Adhyāya 3, Sūtra 84.
[3] *Jaimini's Mīmāṁsā*, 3, 1, 15.

at the Āgneya sacrifice alone, or to that in the Agnīṣomīya sacrifice as well. The reason for the doubt arises in this way. The S'ruti text says

[1] आग्नेयं चतुर्धा करोति ।

One ought to effect a fourfold division of the Āgneya. The word Āgneya signifies any material offered to God Agni. Since the God Agni is one of the two Gods in whose honour the Agnīṣomīya sacrifice is performed, an objection is put forward that the fourfold division is applicable for both the sacrifices. This is the view that is reiterated in the sūtra [2] अविशेषादुभौ वा, but the conclusion is against the acceptance of this view, for, the Taddhita termination found in the word Āgneya indicates that the base denotes the Devatā in its entirety, and that therefore the Agnīṣomīya is not actually contemplated by the rule directing the division of Puroḍāsa into four quarters.

Another text of Āpastamba [3] सर्वाणि हवींषि पर्यग्नि करोति illustrates the same principle. In the discussion relating to the text [4] ग्रहं संमार्ष्टि, 'One cleanses the sacrificial vessel,' a principle is

[1] *Cf. Āpastamba S'rauta Sūtra*, 3, 3, 2, and *Kātyāyana S'rauta Sūtra*, 3, 82.

[2] *Kātyāyana S'rauta Sūtra*, 3, 84.

[3] *Āpastamba S'rauta Sūtra*, 1, 25, 8.

[4] *Jaimini's Pūrva Mīmāṁsā*, 3, 1, Adhikaraṇa, 7.

established that stress is not to be laid upon the gender, number and other attributes belonging to an *Uddesya* or a thing in respect of which another thing is predicated. The substance of the rule may be stated thus. The attributes of a subject are immaterial, but the attributes of a predicate are all important. By the text of Āpastamba referred to above, an act called *Paryagnikaraṇa* which means the litting of a Darbha grass and winding it three times round a particular substance, is directed to be performed of the Puroḍāsa. In this text Puroḍāsa is the subject, and Paryagnikaraṇa is the predicate. A doubt is raised whether Paryagnikaraṇa is to be performed only of the Puroḍāsa or also of any other sacrificial material like the Soma juice, Pasu, etc. The occasion for the doubt arises from the fact that the characteristic of Puroḍāsa is an attribute of the subject. This objection is overruled on the ground that the principle of the Grahaikatva discussion simply lays down that all additional attributes in an Uddesya are not to be taken into account, and not that the essential characteristic itself which alone constitutes a thing an Uddesya, is immaterial; for, in the text relating to the cleansing of the Graha the characteristic of the Graha is quite material, and therefore an extension of the Paryagnikaraṇa to sacrificial materials other than Puroḍāsa is only based on an incorrect perception of the canon

laid down in the *Grahāikatva* discussion, and on the objector's view in the *Camasādhikaraṇa*.[1]

It must be noticed that in all these illustrations the Vārtikakāra is very serious about emphasising the fiction of a Vedic basis of the Smṛtis. While according to the Bhāṣyakāra the illustrations given above are admitted to be erroneous, the Vārtikakāra employs an euphemism, and simply says that the rules laid down in these texts are not to be followed until the S'ruti texts on which they are based are actually discovered. In other words, he is not prepared to admit that they are erroneous, but at the same time declares that one will not be justified in following their precepts. This is only one of the various quibbles in which scholars and lawyers of all nations indulge for the sake of preserving their favourite fictions in tact.

The acceptance of the fictitious theory of a Vedic basis for all Smṛtis leads to another attempt on the part of Mīmāṁsā scholars to start with the presumption that no Smṛti is opposed to any S'ruti. As far as possible, the S'ruti and the Smṛti texts ought to be reconciled with each other on the assumption that any conflict that may exist between an express S'ruti text and an express Smṛti text is apparent and not real. This attitude of the Mīmāṁsakas is clearly borne out in their discussion of texts in what

[1] *Jaimini's Mīmāṁsā*, 3, 1, Adhikaraṇa 8.

is known as *S'iṣṭākopādhikaraṇa.*[1] The line of argument followed by the Bhāṣyakāra is apt to lead one to the conclusion that under certain circumstances he is prepared to place the Smṛtis on a higher level than the S'ruti texts, and the discussion therein is an emphatic denial of the anti-Smṛti tendencies of S'abarasvāmin. While the attempt of the Bhāṣyakāra in the above discussion is wholly intended to establish the superior authority of the Smṛti texts in the light of their contents, the attempt of that famous Mīmāṁsaka of Pro-Smṛti tendencies, Kumārila Bhaṭṭa, is not one of examining the relative weight of the S'ruti and Smṛti texts in the light of their contents, but one of establishing that there is no conflict at all, and that therefore no question of superiority or inferiority arises under any circumstances. The principle of the Adhikaraṇa according to S'abarasvāmin is that when there is a conflict between a Smṛti text which enjoins an act and a S'ruti text which enjoins an attribute of an act, the former is to prevail. The actual Smṛti texts round which the discussion turns are the following :

[2] आचान्तेन कर्तव्यं ।

It ought to be performed by a person who has performed *Ācamana* ;

[2] यज्ञोपवीतिना कर्तव्यं ।

[1] *Jaimini's Mīmāṁsā*, 1, 3, Adhikaraṇa 3.
[2] *Tantravārtika*, 1, 3, 3.

An act ought to be done by a person who wears the sacred thread or cloth on his left shoulder running down the right waist; and

[1] दक्षिणाचारेण कर्तव्यं ।

It ought to be done by the right hand. A conflict is pointed out between the first of the above texts and a S'ruti text which states

[2] वेदं कृत्वा वेदिं करोति ।

One ought to erect the sacrificial altar after making the handle of grass.

This text indicates, by virtue of the termination *Tvā*, the immediate sequence of the two acts. If by chance a person sneezes in the middle, an observance of the ācamana in compliance with the Smṛti rule will lead to a violation of the sequence laid down by S'ruti. In the same way, if by accident the sacred thread or the upper cloth falls down from the left shoulder, if the smṛti rule is to be observed, one has to set it right before the construction of the altar so that the sequence of acts directed by the S'ruti is violated. Similarly, the rule directing the performance of acts with the right hand offends the *Prayoga Vidhi* or an imaginary Vidhi summarising all the subsidiaries of a sacrifice by means of which it is understood that the subsidiaries and the

[1] *Tantravārtika*, 1, 3, 3.
[2] *Tantravārtika*, 1, 3, 3. *Cf.* also *Āpastamba S'rauta Sūtra*, 1, 8, 13.

principal sacrifice comprehended by the Prayoga Vidhi ought to be performed with as little interruption as possible. If all sacrificial acts are restricted to be performed by the right hand alone, there will be a lot of delay in the completion of the sacrifice, which can be safely avoided by resort to both the hands. The three main objections to each of the three texts mentioned above can be summed up as follows: In the first instance, the Smṛti rules under question militate against the order prescribed in the S'ruti; secondly, they exceed the prescribed number of subsidiaries laid down in authoritative treatises; thirdly, they offend the Prayoga Vidhi whose object is to avoid delay or interruption and to secure continuity. All these objections are met by the single argument that they refer to unimportant details which can be conveniently overlooked in favour of things with reference to which they play a subservient part. The above method of discussion followed by S'abarasvāmin is not approved of by Vārtikakāra. In the first instance, he holds that there is no conflict between the said Smṛti texts and the S'ruti rules. In the next place, he points out that the texts cited in the discussion are not proper illustrations of rules exclusively prescribed by Smṛtis, for, with his keen detective eye so well-known to us he is ready with a number of S'ruti texts corresponding to the Smṛti texts discussed by the Bhāṣyakāra. The ācamana laid

down by the first text is shown to be not exclusively *smārta*, by a reference to the following text where it is laid down.

[1] उपविश्य हस्तावववनिज्य द्विराचम्य द्विः परिमृज्य दर्भाणां महदुपस्तीर्योपस्थं कृत्वा प्राङासीनः स्वाध्यायमधीयीत ।

By this text, ācamana is laid down in the course of a study of Vedas. Since Ācamana cannot be said to facilitate in any visible manner the knowledge of the Vedas, the only result of the injunction must be described to be that a sacrifice performed with a knowledge of the Veda obtained by studying without observing the Ācamana rule will not be productive of the desired result, and that therefore the Ācamana in the course of recitation of Vedic texts during a sacrifice is an act contemplated by the sruti text. Khaṇḍadeva, the author of Kaustubha cites an express sruti text for Ācamana not mentioned by Vārtikakāra :

[2] स वै व्रतमुपेष्यन् अन्तराहवनीयं च गार्हपत्यं च उपविश्य अप आचामति ।

The sacrificer in order to drink milk shall sit between the Āhavanīya and Gārhapatya, and drink (Ācamana) water.

[1] *Taittirīya Āraṇyaka*, 2, 11.
[2] *Bhaṭṭa Kaustubha*, 1, 3, 3.

The next text referred to in the discussion by S'abarasvāmin, namely, [1] यज्ञोपवीतिना कार्यं is also described by later Mīmāṁsakas to be not a proper illustration of an exclusive smṛti rule; for, Yajñopavīta or the peculiar position of the sacred thread or the cloth is a thing familiar to the S'rutis. There is actually a text in the Kāṭhaka as follows:

[2] तस्माद्यज्ञोपवीत्येवाधीयीत याजयेद्यजेत वा यज्ञस्य प्रसृत्यै ।

Therefore, only with the Yajñopavīta, one should read, officiate or sacrifice for the furtherance of the sacrifice.

This is the only exact text to the point, as this alone enjoins *Yajñopavīta* as a *Kratvartha*. There is of course mention made of Yajñopavīta in another text which deals with it as a *Puruṣārtha*.

[3] उपव्ययते देवलक्ष्ममेव तत्कुरुते ।

By wearing an Upavita, one actually bears the sign of God.

With regard to the last of the texts, namely, that relating to the performance of sacrifices by the right hand, the exclusive Smṛti character is repudiated by the author of Vārtikas by a reference to the following S'ruti text:

[1] *Tantravārtika*, 1, 3, 3.
[2] *Taittirīya Āraṇyaka*, 2, 1.
[3] *Taittirīya Saṁhitā*, 2, 5, 11.

[1] प्रागुदक्प्रवणं देवयजनं प्रत्यग्दक्षिणाप्रवणं श्मशानकरणं यथा वै दक्षिण: पाणि: एवं देवयजनं यथा सव्य: तथा श्मशानकरणम् ।

The seat of Gods faces the East and the North, and the abode of the dead faces the West and the South. As is the right hand, so is the seat of Gods; as is the left, so is the abode of the deceased.

From the texts cited in the present lecture and the previous lecture, it would have become sufficiently clear by this time that the more modern an author is, the greater are his efforts to spell out an origin for the Smṛtis from the Vedic literature. I have already cited a few examples of texts cited by Kumārila which have not been mentioned by S'abarasvāmin. In many other cases also where S'abarasvāmin never imagined the existence of any express S'ruti, Kumārila is able to refer to an express text. Similarly Khaṇḍadeva refers to a greater number of S'ruti texts than Kumārila himself. On the whole, the process adopted by Mīmāṁsakas is not one of deducing or deriving Smṛtis from Vedas, but of pushing backward the Smṛtis into the Vedas in subversion of all historical sequence.

We may now summarise the ideas of the Mīmāṁsakas about the origin of Smṛtis in the following terms. As already pointed out, some Smṛtis have got an invisible end in view, and some others a visible one. Those that have for their

[1] *Tantravārtika*, 1, 3, 3.

object the advancement of material welfare by the increase of wealth or pleasure, *Artha* or *Kāma*, are to be treated as having a visible end in view. Those that purpose themselves to contribute to the advancement of *Dharma* and *Mokṣa* may be said to have got an invisible end in view. The latter class of Smṛtis which are known by the generic name of *Adṛṣṭārtha smṛtis* are in their turn divisible into two distinct groups: those that derive their authority from an extrinsic source like reason, common sense, etc., and those that are intrinsically authoritative by virtue of mere enactment. The difference between the last two subdivisions of Smṛtis is that in the one case the Smṛti precepts are followed by reasoning clauses which serve as a foundation for their authority; and in the other, the Smṛti is satisfied with the mere laying down of an injunction without any reference to reason or rhyme. The former group of Smṛtis may be termed *Nyāyamūla*, and the latter *Vacanamūla*. Of the two, a text falling under the former head is supposed to stand on an inferior footing, probably because the very fact that an author of Smṛti finds it necessary to support his statement by reason, descending from the high pedestal in which he could have conveniently commanded with authority by the force of his own personality, is presumed to betray a consciousness on his part of the slender foundation on which the authority of a Smṛti supported by

reason rests. Of the Nyāyamūla smṛtis, some are based upon sound reason and well established principles of interpretation, and their authority is unquestionable; others are based on a misapplication of logic and an imperfect understanding of the principles of Exegesis, and agree with the views advocated by the objector according to the Pūrva Mīmāṁsā, and they are not of a binding character. It is also usual to speak of a distinction between Smṛtis that are *Lokasiddha* and those that are *Vedasiddha*. This distinction is practically identical with the distinction already pointed out between Smṛtis with visible ends in view and those with invisible ends in view. By way of illustration it may be pointed out that in the Smṛtis, Purāṇas and Itihāsas, there are a number of rules which lay down methods for the advancement of material welfare. There are references to ancient genealogies and anecdotes, to geography and historical events and also to politics. They are generally Lokasiddha. Of the six Vedāṅgas which also come within the technical meaning of the word Smṛti, *S'ikṣā* or Phonetics is based on Loka in so far as it lays down rules relating to sounds, accents, etc., and is Vedasiddha in so far as a knowledge of it is supposed to confer a benefit, and ignorance a sin. *Kalpasūtra* which is another limb of the Veda is generally Vedasiddha so far as the major portion which lays down rules relating to sacrifices and

other sāstraic duties is concerned, and is Lokasiddha in so far as the residue is concerned, of which a typical instance is found in the S'rāuta sūtra of Āpastamba beginning with [1] को यज्ञः With regard to another Vedāṅga, namely, *Vyākaraṇa* or grammar, the rule relating to the distinction between good and bad words is derived from *Vṛddha Vyavahāra*, that is, an observation of the ordinary spoken language, but the portion of it which lays down that a knowledge of grammar leads to heaven is based upon Veda. An instance of such a rule is the well-known statement [2] एकः शब्दः सुष्ठुज्ञातः सम्यक्प्रयुक्तः स्वर्गे लोके कामधुक् भवति ॥ Similarly, in another Vedāṅga known as *Chandas*, there are both rules which are based upon Loka and those that are based on Veda. The rules relating to metres of Vedic and ordinary poems are Lokasiddha. The rule that a knowledge of it results in virtue belongs to that department of Prosody which is Vedasiddha. A typical instance of such a rule is

[3] यो ह वा अविदितच्छन्दोदैवतार्षेयब्राह्मणेन यजति याजयति वा, etc.

Of *Jyautiṣa* or astronomy, one of the recognised Vedāṅgas, the rules relating to stars, eclipses, and

[1] *Āpastamba S'rautasūtra*, 10, 1, 3.
[2] *Adhvaramīmāṁsākutūhalavṛtti*, Page 76.
[3] *Mīmāṁsākaustubha*, 1, 3, Adhikaraṇa 1, Page 11.

similar other things are based upon ordinary inferences arrived at from mathematical data. The forecasting of good or bad events by the peculiar position of planets and the necessity for the performance of expiatory ceremonies under peculiar planetary combinations belong to that branch of astronomy which is solely traceable to a Vedic origin. In the case of *Nirukta*, it is similarly possible to meet with both types of rules. The same may be said of other sciences like physiognomy, medicine, engineering, politics, horse-training, elephant-training, agriculture, cooking, etc.

So far as Dharma s'āstras are concerned, the existence of both kinds of rules is fully recognised as may be evident from the following text of Yājñavalkya.

[1] अर्थशास्त्रात्तु बलवद्धर्मशास्त्रमिति स्थितिः ।

The rule is that an injunction relating to Dharma is superior to that relating to temporal affairs.

The word Artha s'āstra referred to in the above verse has been interpreted by Mitākṣarā to mean politics contained in the Dharma s'āstras relating to temporal affairs, and not to the well-known Artha s'āstras like that of Bṛhaspati, S'ukra, Kāmandaka or Kauṭalya, and when there is a conflict between a rule of Dharma s'āstra proper and a rule of Artha s'āstra as above understood, the

[1] *Yājñavalkya, Vyavahārādhyāya*, S'loka 21.

former is declared by this text of Yājñavalkya to be of superior authority, and that there is no need for distinguishing it in the light of an Artha sāstra text. Certain typical illustrations, referred to in the Mitākṣarā, of a conflict between Artha sāstra and Dharma sāstra may well be dealt with in this connection. There is a text of Manu which recommends the slaying of an *Ātatāyin* without the least hesitation.

[1] गुरुं वा बालवृद्धौ वा ब्राह्मणं वा बहुश्रुतम् ।
आततायिनमायान्तं हन्यादेवाविचारयन् ॥
नाततायिवधे दोषो हन्तुर्भवति कश्चन ।
प्रच्छन्नं वा प्रकाशं वा मन्युस्तं मन्युमृच्छति ॥

There is also another Smṛti text to the same effect as follows:

[2] आततायिनमायान्तं अपि वेदान्तगं रणे ।
जिघांसन्तं जिघांसीयान्न तेन ब्रह्महा भवेत् ॥

One shall without hesitation kill an Ātatāyin who approaches, be he a preceptor, a boy, an aged man, or a well versed Brahmin. By the assassination of an Ātatāyin, no stigma attaches to the slayer, whether he does it openly or in secret; for wrath is met by wrath.

[1] *Manu*, Chapter 8, S'lokas 350 and 351.
[2] *Mitākṣarā, Vyavahārādhyāya*, under S'loka 21.

One shall attempt to kill an Ātatāyin approaching towards him with an intent to murder in enmity, although he may be a philosopher. By doing so, one shall not become the slayer of a Brahmin.

These Smṛti precepts permitting the killing of an assassin form properly texts of Artha sástra. As against these texts, the Dharmasástraic text proper lays down that by killing a Brahmin intentionally one incurs an inexpiable guilt.

[1] इयं विशुद्धिरुदिता प्रमाप्याकामतो द्विजम् ।
कामतो ब्राह्मणवधे निष्कृतिर्न विधीयते ॥

This is the expiation prescribed for the unintentional slaughter of a Brahmin. But, for intentionally killing a Brahmin, no expiation is declared.

In the case of conflict among these two sets of texts, the latter is given preference as belonging to the domain of strict Dharma sástra. After citing this illustration, Mitākṣarā refers to the argument that the rule of killing an Ātatāyin is a general rule of which the text relating to the killing of a Brahmin forms an exception and that therefore there is no real conflict between these two sets of texts. After noticing this possible objection to this illustration, Mitākṣarā proceeds to give another more suitable illustration of two sets of texts which are necessarily conflicting with

[1] *Manu*, Chapter 11, S'loka 89.

each other. An Artha śāstra text from the Smṛtis runs thus:

[1] हिरण्यभूमिलाभेभ्यो मित्रलब्धिर्वरा यतः ।
अतो यतेत तत्प्राप्तौ

As the acquisition of friends is better than the acquisition of gold and lands, one shall attempt to get it.

A Dharma śāstra text relating to the conduct of a judge in deciding a litigation runs as follows:

[2] धर्मशास्त्रानुसारेण क्रोधलोभविवर्जितः ।

In accordance with the Dharma śāstras and free from wrath and covetousness.

If a cause is decided in a particular manner the judge becomes the friend of a wealthy and influential person, in which case the Artha śāstra rule is observed. If the cause is decided the other way, he courts his enmity, in which case the Dharma śāstra rule is observed. In the one case the Dharma śāstra has to be violated, and in the other the Artha śāstra. In the case of such a conflict the general rule laid down by Yājñavalkya applies, namely, that the Dharma śāstra is superior to the Artha śāstra.

The existence of a very large number of Smṛti texts based upon worldly notions is clearly recognised

[1] *Yājñavalkya Ācārādhyāya*, Śloka 352.
[2] *Yājñavalkya Vyavahārādhyāya*, Śloka 1.

by Mitākṣarā as true in a greater degree at least as far as the Vyavahāra portion is concerned. In the chapter relating to the partition of heritage, when discussing the meaning of the text enumerating the list of impartible properties, an objection is anticipated and met by an answer which clearly evidences the view that there is a large admixture of Lokasiddha texts in the department of Dharma śāstra dealing with Positive Law. The text of Yājñavalkya which forms the subject matter of discussion is the following:

[1] पितृद्रव्याविरोधेन यदन्यत्स्वयमर्जितम् ।
मैत्रमौद्वाहिकं चैव दायादानां न तद्भवेत् ॥
क्रमादभ्यागतं द्रव्यं हृतमप्युद्धरेत्तु यः ।
दायादेभ्यो न तद्दद्याद्विद्यया लब्धमेव च ॥

Whichever else is earned by one's self without detriment to the parental estate, that which is acquired by friendship or in matrimony shall not belong to the coparceners. One who reclaims a property that has devolved in regular succession but has been lost to the family shall not give it to the coparceners, nor shall one give them what is earned by means of learning.

The view of Mitākṣarā is that the clause 'without detriment to patrimony' must be taken as qualifying all subsequent modes of acquisition

[1] *Yājñavalkya Vyavahārādhyāya*, Ślokas 118 and 119.

referred to in the text. An objection is raised that as it is an elementary canon that an acquirer and none else is the owner of the subject matter of acquisition, it needs no mention that whatever is acquired through friends, etc., without detriment to patrimony is not liable to partition among brothers, and in answer to this objection Vijñāneśvara gives expression to his view that the text under discussion is but a repetition of an idea commonly known in the world.

[1] नह्यत्र प्राप्तस्य प्रतिषेधः किंतु सिद्धस्यैवानुवादोऽयं, लोकसिद्धस्यैवानुवादकान्येव प्रायेणास्मिन् प्रकरणे वचनानि ।

"This text does not prohibit anything which is otherwise possible. But this is only a repetition of a thing already known. In this chapter texts are mostly repetitions of ideas already current in the world."

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[1] *Mitākṣarā Vyavahārādhyāya*, under Ślokas 118 and 119.

FOURTH LECTURE

We have seen that Veda is in theory the fundamental source of all law, and that the Smṛti is authoritative as reproducing the rules underlying the Vedas. Next to the Smṛti, custom or *S'iṣṭācāra* is considered to be an important source of law. Like the Smṛtis, the authority of customs is supposed to be derivative as being founded ultimately upon the Vedas. But the reason assigned by the Mīmāṁsakas for recognising custom as a valid source of law betrays the fundamental truth on which the theory is based. As in the case of Smṛtis, the reason for the recognition of this important source of law is *S'iṣṭatraivarṇikaparigraha*, *i.e.*, the acceptance of the orthodox section of the Hindu community. The historical significance of this reason is quite obvious. It naturally leads us to suppose that a custom which at one stage did not form a portion of the Positive Law could at a later stage gain importance as a well known rule of law by virtue of the currency it might acquire by the gradual efflux of time. When referring to custom as a source of law, Manu employs the term साधूनामाचारः (Usage of the good) in the following text :

[1] वेदोऽखिलो धर्ममूलं स्मृतिशीले च तद्विदाम् ।
आचारश्चैव साधूनां आत्मनस्तुष्टिरेव च ॥

The entire Veda is the source of Dharma. So are the reminiscences and conduct of those well versed in it; and so are the usage of the good and the satisfaction of one's own conscience. In determining the characteristic of custom as a legal source, two tests are laid down by Mīmāṁsakas. One has reference to the nature of persons among whom the usage is to be prevalent, and the second has reference to the intention with which a particular course of conduct is to be followed. The persons among whom the prevalence of usage is reckoned as a determining factor of its characteristic as a legal source must come within the definition of the term *S'iṣṭa.* Secondly, it is not every custom of a S'iṣṭa that is to be taken for Dharma. Only such of his acts as are accomplished under the consciousness of performing a meritorious act will come under the heading of customs originating the law. The absence of either of the said two factors will deprive a custom of its validity as a source of law or morality. A particular course of conduct pursued by an unbeliever in the Vedas will, in no event, amount to a binding custom, despite the fact that the conduct is prompted by the intention of doing a meritorious act. This is exactly the reason why the Mīmāṁsakas deny the authority

[1] *Manu*, Adhyāya 2, S'loka 6.

of precepts declared by thinkers of a different persuasion in their entirety without even making exception in favour of most of the ordinary rules of morality or conscience that are common to the Hindu and the Non-Hindu philosophies. With regard to the precepts such as those relating to the kindness of animals, honesty, truth-telling, etc., they are authoritative in so far as they are recognised by the Vedas or the other legal sources founded upon the Vedas. They do not possess any authority by reason of their having been mentioned in the religious books of Non-Hindus. This is peculiarly the view of Kumārila Bhaṭṭa who chooses to devote one entire Adhikaraṇa to the discussion of this topic. He draws the reader's attention to certain rules of conduct like Ahiṁsā which are common both to the Vedic and the Buddhistic religions. He is prepared to recognise the binding character of these rules as laid down in the Vedas, and not as embodied in the Buddhistic codes of morality. This theory is pushed by him to a very great extent so much so that he makes a grotesque proposition that if a man abstains from killing an animal or from doing a similar act of mischief with the knowledge of its being prohibited by the heterodox codes, he will not free himself from the position of a sinner, but if he abstains from doing a cruel act with the knowledge of its being prohibited by Vedas, he may be said to do an act of piety. If the motive for the

abstention or for the following of a particular course of conduct is its prohibition or command by the Non-Vedic school of thinkers, a person cannot be said to do an act of religion. If, on the other hand, a person abstains from doing a certain thing because it is opposed to the policy of the Vedic religion, he is the very embodiment of piety and religiousness. This curious theory about the validity of a custom differing with the different aspects is, it seems, an outcome of a necessity that prevailed in the age of Kumārila whose supreme attempt was to drive out the Buddhistic religion which had by his time begun to undermine the orthodox Brahmanism. The theory of *Svataḥ Prāmāṇya* of Veda is another illustration of the peculiar theories invented by orthodox Brahmin thinkers in order to put down Buddhism. According to this latter theory, the truth of a Vedic text is taken to be self-evident, and when by this process it is made possible to start from the defensive, the burden of challenging its authority is thrown on the person who wants to do so. By the adoption of this theory, the orthodox school is relieved of its duty of establishing the soundness of Vedas by independent evidence. When the onus is thus shifted to the other side, it becomes quite easy for the ingenious Mīmāṁsaka to invent a number of quibbles by which he can overcome objections raised by the thinkers of a different persuasion. The fight of the Mīmāṁsaka against the Buddhist is a defensive

act intended to ward off the onslaughts of the Buddhists. The enemy is thus thrown out on the offensive. His best efforts will therefore be to refer to the incongruities, absurdities and inconsistencies in the philosophy of the Vedas. To meet this situation, the orthodox believer of the Veda draws from his unlimited source of legal acumen, and founds a peculiar system of interpretation, in the light of which alone the Vedas are to be construed. Thus the absurdities and incongruities are easily removed, and the Vedic texts have to be challenged, if at all, in the sense in which they can be interpreted by their peculiar system of Exegesis. This theory about the self-evident character of the authority of the Veda led to a further generalisation affecting one of the fundamental bases of the conceptions of Epistemology. From the position that Veda is valid by itself, it is an easy glide to the theory that all knowledge is valid by itself. The sequence of the two theories will be properly a subject of more detailed research by scholars engaged in tracing the evolution of Indian Philosophy and the different schools thereof. For our purpose at present, it would suffice to say that one of the characteristics of a valid custom is that it must have been acted upon by persons who are ardent believers in the Vedas. But this characteristic is by itself not sufficient to impart validity to a custom. The daily avocations pursued by a follower of the Vedic religion in

common with others do not strictly come within the heading of 'customs of a binding character'. Every S'iṣṭa takes meals daily much in the same way as an ordinary man. He eats, he walks, he marries, he multiplies and does a number of things voluntarily as any other creature. Is it to be supposed that such conducts are also binding, merely because they are followed by S'iṣṭas? There is also a more serious objection to the sufficiency of this test in determining the authority of customs. Most great men whose claims for integrity and for high spirituality are unquestioned are reported to have been guilty of gross lapses of conduct. Both Mīmāṁsā treatises and the commentaries on Dharma s'āstras abound in illustrations of irreligious acts committed by sages of old. Prajāpati is reported in the Vedas to have married his own daughter Uṣas: Indra approached Ahalyā with lustful intent: again he slew a Brahmin named Vṛtra: Nahuṣa on ascending the throne of Gods coveted S'acī: Vasiṣṭha attempted to commit suicide by being drowned in water on account of grief due to his sons: Purūravas similarly attempted suicide on account of separation from Ūrvas'ī: Vis'vāmitra officiated at a sacrifice performed by a Caṇḍāla: Bhīṣma performed a sacrifice without attaching himself to any Ās'rama: the blind Dhṛtarāṣṭra performed a Yāga: Yudhiṣṭhira appropriated the hand of Draupadī already taken in wedlock by

Arjuna: he told a lie for the purpose of putting to death his own preceptor and a Brahmin, Droṇa: Arjuna married his own maternal uncle's daughter Subhadrā: Arjuna and Kṛṣṇa drank wine: Vyāsa, the perpetual bachelor procreated Dhṛtarāṣṭra and Pāṇḍu by cohabiting with his brothers' widows Ambikā and Ambālikā. It is easy to multiply examples. Suffice it to point out that the acting upon by sages of old is not by itself clearly indicative of the binding character of a custom. Hence arises the necessity of laying down a further test, namely, whether a particular course of conduct has been followed by them under the consciousness of doing a meritorious act or without such consciousness. This test gives a complete and effective answer to the objections likely to be raised in view of the several immoral acts perpetrated in days of old. With regard to most of the immoral acts referred to above, they are possible of being explained away quite in consonance with the accepted notions of morality and the dictates of our S'āstras. With regard to the rest of them they are not binding or of any authority, because the authors of those acts were themselves conscious that they were committing a sin. The alleged alliance in matrimony of Prajāpati with his own daughter Uṣas is only a figurative expression of the idea that the hour of dawn is favourite to Brahman, and that it accounts for that particular hour to be known

under the style of Brāhma Muhūrta. With regard to Bhīṣma it is not true to say that he ever remained without any Āsrama. As a matter of fact, from the passages of Mahābhārata it may be gathered that he belonged to the Āsrama of the householder, and that his bachelorhood merely consisted in abstention from procreation in view of the celibate vow taken for the sake of his father. With regard to the blind Dhṛtarāṣṭra, it is possible to conceive that the sight of ghee, etc., used in the sacrifice was specially conferred on him by the grace of Vyāsa as the sight of his son. Draupadī's case is treated as exceptional, she being invested with virginhood by the boon of Īsvara by which she was permitted to have five husbands. The utterance of a lie by Yudhiṣṭhira that Asvatthāman was dead is in fact a sin for the removal of which alone he performed the horse-sacrifice. With regard to the alleged marriage of Arjuna with his maternal uncle's daughter, there is no authority for supposing that Subhadrā was the daughter of Arjuna's maternal uncle Vasudeva, and the only apparent authority for such a supposition is the following text:

[1] अनुजा वासुदेवस्य सुभद्रा वरवर्णिनी ।

Three explanations are offered by the author of Kaustubha for the objections based upon the text. Firstly, the word 'sister' refers not to a full sister,

[1] *Mīmāṁsā Kaustubha*, 1, 3, 3.

but to a sister born of different mothers by the same father, and that Subhadrā was the daughter of Kṛṣṇa's stepmother Rohiṇī. Another answer suggested is that Subhadrā was the daughter of the sister of Rohiṇī, the stepmother of Kṛṣṇa, because the daughter of one sister is very often loosely expressed as the daughter of all sisters. A third explanation offered is based upon the peculiar use of the expression in the Lāṭa country where a paternal aunt's daughter is usually called a sister, so that in accordance with the usage prevalent there, it is possible to imagine that Subhadrā was the daughter of the paternal aunt's daughter of Rohiṇī who was the stepmother of Kṛṣṇa. The last of the explanations indicates the highly developed sense of our ancients in the sciences such as philology which we consider to be extremely modern, and is one that affords a good lot of material for those engaged in that particular branch known as Semasiology which mainly has to deal with the history of the meaning of words. The first of the said three explanations does not give a sufficient answer for the objection based on the theory that Subhadrā was the maternal uncle's daughter of Kṛṣṇa, for though Kṛṣṇa and Subhadrā might have been born of different mothers, their father was nevertheless the maternal uncle of Kṛṣṇa. This objection is overcome by the next two explanations. Another explanation is also mentioned

in Kaustubha as representing the view of some, which it is also important to notice here as having a bearing on the growth of the law of adoption. Arjuna's mother, namely, Pṛthā was not the legitimate daughter of Kunti Bhoja, but given to him in adoption by her natural father S'ūra so that Vasudeva and Arjuna's mother are not, strictly speaking, brother and sister, and consequently the marriage of Arjuna with the daughter of Vasudeva is not to be considered as the marriage of a maternal uncle's daughter. Khaṇḍadeva does not agree with this view, for the text of Vasiṣṭha relating to adoption speaks of a *Putra* in the masculine thus :

[1] पुत्रं प्रतिग्रहीष्यन् व्याहृतिभिर्जुहुयात् ।

One about to take a son in adoption ought to perform *Vyāhṛti Homa*.

And hence a daughter purported to be taken in adoption does not pass from the family of the natural parents. If it is objected that the word 'Putra' not occurring in the Predicate clause of the command does not necessarily convey the idea of the masculine gender, it would follow that Vasiṣṭha's text applies to the adoption of daughters, and hence also the text laying down that the adoptee forfeits his or her natural family and rights therein. Only in this view can the adoption of S'āntā mentioned in Rāmāyaṇa be explained, and the S'iṣṭācāra to the

[1] *Vasiṣṭha*, Adhyāya 15.

same effect recorded in Madana Pārijāta. Once it is granted that the adoption of daughters is recognised, it follows that the rules relating to the degrees within which an adopted son is prohibited to marry apply *mutatis mutandis* to relationship traceable through adopted females. There is the rule prohibiting an adopted son to marry within the prohibited degrees both in the natural and the adoptive families.

[1] ऊर्ध्वं सप्तमात्पितृबन्धुभ्यो बीजिनश्च मातृबन्धुभ्यश्च पञ्चमात्।

Hence Khaṇḍadeva holds that the objection to Arjuna's marriage cannot be met thus, but only in the two ways suggested previously. With regard to the drinking of liquor by Arjuna and Kṛṣṇa, it is sufficient to point out that wine of all kinds is prohibited for a Brahmin, and that the use of a particular kind of wine known as Paiṣṭī is alone prohibited for a Kṣatriya.

Apart from the objectionable practices of ancient historic holy personages, there are some customs recorded in the Dharma śāstras themselves with regard to whose validity controversy has raged from time immemorial. Very often we meet with an eastern school and a western school, with a northern school and a southern school mentioned by very ancient Smṛtis. Bodhāyana refers to five peculiar customs of the Northerners

[1] *Gautama Dharma Sūtra*, Adhyāya 4, Sūtras 3, 4 and 5.

which are decried by the Southerners, and five customs of the latter in respect of which the former pour ridicule on the latter.

[1] पञ्चधा विप्रतिपत्तिः दक्षिणतः, अनुपनीतेन च भार्यया सह भोजनम्, पर्युषितभोजनं, पितृष्वसृमातुलदुहितृपरिणयनं इति । तथोत्तरतः पञ्चधा, ऊर्णाविक्रयः, सीधुपानं, उभयतोदद्भिर्व्यवहारः, आयुधीयकं, समुद्रयानमिति ॥

A disagreement exists with regard to the South on the following five points: (1) Taking of meals with an uninitiated person, (2) Husband and wife taking meals together, (3) Eating of old food, (4) Marriage of a paternal aunt's daughter, and (5) Marriage of a maternal uncle's daughter; similarly with regard to the North, on these five points: (1) Wool trade, (2) Drinking liquor, (3) Slave trade, (4) Selling arms, and (5) Crossing the seas.

Smṛti Candrikā, Smṛti Muktāphala and other digests of authority in South India uphold the validity of the first set of five customs on the authority of a text of Bodhāyana,

[2] इतर इतरस्मिन् कुर्वन्दुष्यति ।

'A man of one school becomes a sinner by following the practice of another school' which therefore

[1] *Bodhāyana Dharma Sūtra*, 1, 1, 17, 18, 19 and 20.
[2] *Ibid.*, 1, 1, 21.

indirectly permits a man to follow the good and bad practices of his school, and also upon the authority of a text of Manu

[1] येनास्य पितरो याताः येन याताः पितामहाः ॥
तेन यायात्सतां मार्गं तेन गच्छन्न ऋष्यति ॥

The path by which one's fathers have gone, and that by which his grandfathers have gone, by that he shall reach the path of the good. By following it, he does not commit a sin.

The authors of Mīmāṁsā works have uniformly held the stricter theory against the validity of such customs. But the fact that the ancient Smṛtis themselves make mention of the prevalence of these customs shows that one of the important tests of finding out the legal character of a particular custom is its general prevalence in a particular locality.

In theory, customs derive their authority immediately from a lost or unknown Smṛti text, and ultimately from a lost or unknown S'ruti text. It is a well known rule of Mīmāṁsā already dwelt upon in the previous lectures that, in theory, an express S'ruti text over-rides the provision of an express Smṛti text. As a corollary to this statement, a further proposition arises with regard to the character of customs as a legal source. The authority of customs is inferior to that of the

[1] *Manu*, Adhyāya 4, S'loka 178.

Smṛtis as resting upon a double presumption as against a single presumption in the case of Smṛtis. The result is that in the case of a conflict between a custom and an express Smṛti text, the strict scientific view is that the latter prevails. This is the conclusion drawn by the author of Vārtika from one of the discussions in the Smṛti Pāda of Pūrva Mīmāṁsā. The discussion turns round the validity of the custom prevailing in the south, of a person marrying his maternal uncle's daughter. An express Smṛti text prohibits such a marriage.

[1] मातुलस्य सुतामूढ्वा मातृगोत्रां तथैव च ।
समानप्रवरां चैव त्यक्त्वा चान्द्रायणं चरेत् ॥

Having married a maternal uncle's daughter, a girl belonging to the mother's gotra, or a girl of the same Pravara, a person shall, after forsaking her, perform the *Cāndrāyaṇa* penance.

In the face of this express prohibitory text, the custom is of absolutely no force, having regard to the fact that before the custom raises the presumption of a Vedic text through an inferential Smṛti text, the express Smṛti text to the contrary leads to the inference of a Vedic text so as to prevent an inference of a Vedic text in support of custom.

Next arises the discussion as to the scope of the fiction that a custom is based upon a S'ruti text. With regard to the customs that are of universal

[1] *Jaiminīyanyāyamālā*, 1, 3, 5.

prevalence there will be no difficulty in predicating the basis of a Vedic text in unqualified terms. As regards customs prevalent in a particular locality, the question arises whether they also raise the presumption of a Vedic text in their support, or whether an inference of a Vedic text is shut out on account of the non-observance of the said customs in other provinces. The discussion must necessarily arise in a case where there is no S'ruti or Smṛti text expressly in favour of or against such customs. This point is the subject of discussion in what is known as [1] The *Holākādhikaraṇa*.

Holākā is the name of a festival performed in the spring season, and usually observed by the Easterners. The question is whether the observance of this festival will lead to an inference of a Vedic text of a restricted or a general application. The argument in support of the latter theory which is adopted at the conclusion is that the word Easterner is of indefinite significance, and it is not possible to presume a Vedic text that all Easterners shall perform Holākā or to a similar effect; otherwise an insuperable objection arises, which is the central point with reference to which East or West, North or South is to be fixed. Even assuming that we are agreed as to the starting point, does the word 'Easterner' denote a man living in the East, or a descendant of persons who lived in the East? In

[1] *Mīmāṁsā Kaustubha*, 1, 3, 8.

any case, it will be difficult to account for the non-observance of the festival by a person who has migrated to the East, and the observance of the same by the descendants of persons who have long since migrated from the East. Whether the argument is sound or not, the principle of this Adhikaraṇa represents in strong colours the far-reaching consequences of the fiction of a Vedic basis for customs. The presumption of a Vedic text of a general application from a custom of restricted prevalence results in establishing the binding character of local usages universally.

In this connection an important distinction between the modern juristic view as laid down by judgments of British courts administering justice in cases arising from India and the orthodox view of the Indian philosophers chiefly represented by the Mīmāṁsakas claims our best attention. The well-known rule laid down by the Privy Council in the Collector of Madura *versus* Muthuramalinga[1] is that in the Hindu System of law clear proof of usage will outweigh the written text of law. As against this view, we meet with the theory put forward, repeated and established by the Mīmāṁsakas that in the case of a conflict between an express text and usage, the latter gives way before the former. In the light of the Hindu Jurisprudence, which is the more acceptable view of the two? There is a clear

[1] 12 *Moore's Indian Appeals*, 436.

conflict between the two views so that an attempt of effecting harmony between the two views seems well nigh impossible. One is tempted to conclude that the opinion of the Privy Council is clearly wrong in the face of the theory of the Mīmāṁsakas laid down in unambiguous terms. But it is possible to give an explanation of both the theories as being sound in principle. The difference in the two views can only be explained in the light of difference in standpoints. The theory of the superiority of customs over the written law is quite consistent from the standpoint of a judge whose duty it is to administer justice according to principles of strict Positive Law in deciding litigations arising for consideration. From a broader standpoint which is the one adopted by the Mīmāṁsakas who had to deal not merely with rules of Positive Law, but with Dharma in its utmost extended signification including morality, ethics and religion, it is quite justifiable to voice forth the view of the comparative superiority of the written precepts of the sacred law over customs. When a man has to find out which is righteous, moral, good from an ethical point of view, one has naturally to look to the sacred writings of the ancient sages, but when a case on hand has to be decided between litigants, the real code of law is not so much to be sought for in the writings of the ancient sages as in the rules of conduct that have been consciously followed by the community at large,

and this distinction in the standpoints is fully borne in mind by the authors of the Dharma śāstras themselves who when dealing with the law applicable to litigants actually lay down in subversion of the strict Mīmāṁsaka theory that customs are of superior efficacy when compared with the precepts of the Holy writings. In the administration of law which is the principal duty of a judge, the ancient sages themselves refer to four distinct classes of laws to be administered by the King. The first class of laws to be applied by a judicial tribunal in the matter of deciding contested claims generally comes under the rules of justice, equity and good conscience, the second is the common law or the law written and unwritten, the third is usages—local, tribal or otherwise, the fourth is legislation or command of the sovereign. The relative authority of the four heads of laws is inverse to the order in which they are mentioned here. The four kinds of laws that are applicable in the decision of a disputed case have been mentioned by Bṛhaspati in the following text:

[1] धर्मेण व्यवहारेण चरित्रेण नृपाज्ञया ।
चतुष्प्रकारोऽभिहितः सन्दिग्धेऽर्थे विनिर्णयः ॥

The decision in a doubtful case is by four means: *Dharma*, *Vyavahāra*, *Caritra*, and *Rājaśāsana*.

[1] *Smṛticandrikā*, Mysore Govt. Oriental Library Series, No. 45, page 21.

Each of the said terms has been explained *seriatim* by Kātyāyana in the following text:

[1] दोषकारी तु कर्तृत्वं धनस्वामी स्वकं धनम् ।
विवादे प्राप्नुयाद्यत्र धर्मेणैव स निर्णयः ॥

Where an offender is convicted and where money is adjudged in favour of the owner, the decision in such a litigation is said to be by means of *Dharma*.

[2] स्मृतिशास्त्रं तु यत्किंचित्प्रथितं धर्मसाधकैः ।
कार्याणां निर्णयार्थे तु व्यवहारः स्मृतो हि सः ॥

Where in the judicial settlement of disputes is applied a Smṛti rule propounded by the seers of Dharma, the adjudication is said to be by *Vyavahāra*.

[2] यद्यदाचर्यते येन धर्म्यं वाधर्म्यमेव वा ।
देशस्याचरणान्नित्यं चरित्रं तत्प्रकीर्तितम् ॥

Whatever is done in consonance with justice or opposed to it, constantly by reason of a territorial usage is called *Caritra*.

[2] न्यायशास्त्रविरोधेन देशदृष्टेस्तथैव च ।
यं धर्मं स्थापयेद्राजा न्याय्यं तद्राजशासनम् ॥

The rule which a king establishes in supersession of Dharma, Vyavahāra and provincial usage is valid, and it is known as the *King's command.*

[1] *Smṛticandrikā*, Mysore Govt. Oriental Library Series, No. 45, page 21.

[2] *Ibid.*, page 22.

From a perusal of these texts, the appropriateness of the terms used by me in the English rendering of the four heads of law will become apparent. Dharma is explained to be a simple rule of law whereby a trespasser is deprived of the rights of which he came into possession by means of his wrong, and a person deprived of a thing for no fault of his is restored the possession of the thing of which he is the legitimate owner. This is an ordinary rule based upon first principles, of returning good for good and bad for bad. In the Roman law this would probably come within the province of *Jus Naturale*. Under this legal head which goes by the name of Dharma a real offender, whether his guilt is proved by evidence or not, is punishable, and the dispossessed owner of a thing is entitled to recover back possession of his property irrespective of proof of ownership and dispossession. This idea is aptly signified by the phrase, justice, equity and good conscience. The next head of law mentioned in the Smṛtis as applicable to the adjudication of claims between contesting parties is termed Vyavahāra. The word Vyavahāra has got different significations in different contexts. In works on logic, the term Vyavahāra is used as equivalent to S'abdaprayoga or the employment of words, sometimes also as equivalent to direct perception. In Vedantic works, it signifies phenomenal reality as opposed to Paramārtha or absolute reality which is the

peculiar characteristic of Brahman. In the legal literature, it is sometimes used to denote a legal proceeding, sometimes it means Positive law as opposed to the other branches of Dharma sāstra, namely, Ācāra and Prāyascitta, but none of these significations is consistent with the employment of the word Vyavahāra to a class of the several laws to be administered by a court of justice. It cannot conceivably mean Positive law, for the next two heads of laws namely, customary law and legislation are as much part and parcel of the Positive law as any other. The only meaning that can be ascribed to the word Vyavahāra in this context is the law as embodied in the sacred writings of which the Smṛti literature is referred to in particular by the definition given by Kātyāyana. Hence the word Vyavahāra is a comprehensive term including within its signification not merely the Smṛti precepts but also Vedic rules and such of the rules based on custom as are properly treated to have been anticipated by the Vedic or Smṛti texts. In accordance with this view I have chosen to translate the word Vyavahāra into Common Law in English. Caritra is the next branch of law to be met with in the aforesaid text. Caritra is properly rendered as recorded customs prevailing in particular localities. And legislation which is the last head of law mentioned in the text is the direct command of the Sovereign in the exercise of

his legislative or executive functions. The distinction between these four classes of laws is brought home to our minds by the following text of Bṛhaspati which deals with the respective methods of proof favoured by the respective laws.

[1] तत्र सत्ये स्थितो धर्मः व्यवहारस्तु साक्षिषु ।
चरित्रं पुस्तकरणे राजाज्ञायां तु शासनम् ॥

Of the said four, justice, equity and good conscience rests on conscience. Common law rests on evidence, customary law in records, and legislation on the pleasure of the Sovereign.

According to justice, equity and good conscience, the real truth or merits or substantial justice ought to be the ultimate aim of a judge. According to Vyavahāra, an ideal decision is not the one that is based on the personal convictions of the judge or of the parties or a satisfaction of anybody's conscience, but the one that is entirely based upon evidence, oral or documentary, adduced by the parties in the case. There is likely to be a failure of substantial justice under the head known as Vyavahāra, for a judge is not entitled to launch upon an independent enquiry without conforming to the rules laid down by Smṛtis with regard to the method of investigation, the letting in of evidence, etc. The chief distinguishing characteristic of

[1] *Smṛticandrikā*, Mysore Govt. Oriental Library Series, No. 45, page 25.

customary law is its being recorded in authentic sources of information like history, registers of customs recorded at the bequest of the Sovereign or by private individuals of their own accord, and this head includes customs which are in derogation of both rules of justice, equity and good conscience and the rules of Common law. The last class of laws which is of paramount importance known as legislation depends for its authority on the word of the sovereign, whether or not agreeable to justice, common law or the customary law. As regards the relative weight of these distinct classes in their practical application to a judicial settlement of disputes, the following text of Nārada is relevant as dealing with cases of mutual conflict among them.

[1] धर्मश्च व्यवहारश्च चरित्रं राजशासनम् ।
चतुष्पाद्व्यवहारोऽयं उत्तरः पूर्वबाधकः ॥

A legal proceeding rests upon four feet—Dharma, Vyavahāra, Caritra and Rājasāsana. Of the four, the later supersedes the former.

According to this rule, when a case is governed by a rule of justice, equity and good conscience, and there is no rule either of the Common Law or the Customary Law or Legislation relating to the same, the decision should be according to the sense of natural justice. When there is a conflict between the natural sense of justice and the intention or purport

[1] *Nārada*, Adhyāya 1, S'loka 10.

evidenced by treatises of the Common Law, the adjudication of a case must conform to the latter in preference to the former. The superiority of Common law to the law of natural justice can be brought home to our minds by discussing a case of conflict between the two. The rule of natural justice prompts that a man who is the real owner of a particular property must have possession of the same how long so ever he might have been dispossessed of it by a stranger. As against this simple rule of justice, there is a text of Vyavahāra prescribing the period of limitation within which a dispossessed owner has a right to bring an action at law for the recovery of property of which he had been dispossessed. The following text of Yājña-valkya lays down the period of prescription by adverse possession.

[1] पश्यतोऽब्रुवतो भूमेः हानिर्विंशतिवार्षिकी ।
परेण भुज्यमानायाः धनस्य दशवार्षिकी ॥

A right to immovable property of a person who sees and does not object, is extinguished by the enjoyment for twenty years by a stranger; and that to movable property, by enjoyment for ten years.

The rule of limitation prescribed in the above text has to be applied and acted upon, however opposed it may be to substantial justice. Similarly when a thing that has actually taken place has not

[1] *Yājñavalkya Vyavahārādhyāya*, S'loka 24.

been proved by evidence adduced in the course of the judicial proceedings it will not be the basis of an adjudication of rights between the parties whatever may be the conviction of a judge as to the reality prompted by extraneous circumstances. A concrete illustration of such a conflict is described in the Smṛti Candrikā: Where a King's wife was laid hold of by the hand, by a subordinate chieftain with lustful intent, and the offender is prosecuted for his crime, but in the course of the prosecution the witnesses who alone can speak to the occurrence shield the offender from conviction by making false statements on oath, and there is absolutely no discrepancy in the evidence tendered by them, a conviction of the real offender is not justifiable under the law; for, under the Common law a judge is concerned with evidence and not with truth. Similarly when there are two conflicting rules on the same point, one belonging to the Common law, and the other to the local customary law, the settlement of causes by a court of justice must be guided by the latter and not by the former. For example, adultery is a crime prohibited by and punishable under the Common law. Suppose it is tolerated by the usage of a particular country in which the case has arisen for adjudication, a conviction is not supported by authority. This is an illustration given in the Smṛti Candrikā and is quite appropriate, having regard to the fact that adultery is not a

crime punishable under such an advanced jurisprudence as the modern English law. Then we pass on to illustrate a conflict between legislation and the rest. Legislation here is used not in the restricted sense of the particular species of commands which emanate from the Sovereign in the exercise of his legislative functions, but used in a comprehensive sense so as to include all the commands of a Sovereign whether in the exercise of legislative or of executive powers, whether they are particular commands or general commands. According to the rule of natural justice, the rule of common law and the rule of customary law, a man is entitled to be left undisturbed in the possession of his property, and nobody has a right to commit trespass on the same. Suppose a King's officer enters the land of another with a warrant for execution or for some other sufficient cause or even enters at the instance of the Sovereign without any cause whatsoever, is he to be condemned civilly or criminally for an act of trespass ? The answer is no. The reason is furnished by the fiction that a King can do no wrong, as a result of which the theory is well established that the King's command supersedes all other law.

This discussion leads us to another controversial theme about the authority of the Sovereign's command in the Hindu Jurisprudence. Very often we meet with the statement made and repeated in

modern English text books on Hindu Law that under the Hindu system of jurisprudence the Sovereign is as much bound to conform to the rules of law as any other person. The reasoning adduced in support of this theory is that the Smṛti texts lay down rules for the observance of the Sovereign as much as for that of the subjects. The whole of the Rāja Dharma Prakaraṇa and a considerable portion of the chapters relating to special procedure exemplify ordinances to be observed by the Sovereign. That proceeds on the assumption that the King is subject to the jurisdiction of Smṛtis. The reasoning is apparently sound, but it is not an accurate statement to make that Positive Law exists independently of the Sovereign. The Austinian theory which represents a diametrically opposite view declares all laws to be a creature of the Sovereign, and this is the only theory that is scientifically sound. In order to determine the correctness of either of these two theories, it is necessary for us to investigate into the ideas necessarily involved in legislation. Laws or statutes are a species of commands, and commands are the dictates of a superior to an inferior. When the idea of superiority or inferiority refers to the political might or to political subjection, the commanding authority is the Sovereign, and the person commanded is the subject. Of the political commands, some lay down the observance of an isolated act, and they are called

particular commands. When a political command lays down the observance of a class of acts or forbearances, it comes within the strict meaning of the word law. The ultimate source of all laws is the will of the state. If a rule of justice, equity and good conscience is of authority, it is because of its enforcement by the Sovereign. If a rule of Common law is binding upon the subjects, it is because of sufferance by the King, and if customary law is acted upon in a court of justice, the simple reason is that it has been accorded a legal recognition by the state. This is not an idea peculiar to any system of jurisprudence, the principle is the same everywhere as propounded by Austin, and the Hindu Law is in no way an exception to the general statement of the theory. It will therefore be seen that the statement that the Sovereign is as much bound by rules of law as any other ordinary subject is open to grave objection in principle. As a matter of fact the modern text-writers of the Anglo-Hindu jurisprudence who are most vociferous in subjecting the Sovereign to the jurisdiction of our Smṛtis seem to have entirely forgotten the four heads of law mentioned in our ancient Smṛtis applicable to causes arising for decision before a judicial tribunal and their relative authority in cases of mutual conflict. The superior position assigned to a Sovereign's command as compared with rules of justice, Common law and customary law is only consistent with the

theory that the Sovereign represents the ultimate source of law. He may be a source of law either because of express legislation or because of recognition given by him by way of enforcement of rules already set forth in text-books or embodied in the customs of the land.

A command involves two correlative ideas, a superior and an inferior. It means an expression of the wish on the part of a superior that an inferior shall do or refrain from doing a certain thing. Hence the intention of the superior gives rise to the mental determination on the part of the inferior to do or omit to do a certain thing in deference to the superior's desire. The ideas of duty and sanction are also included in that of a command. Every command lays down a duty, and is supported by a sanction. A sanction has been defined by Austin as the evil resulting to an inferior in the event of disobedience to a superior's command. According to a different school of jurists headed by Locke and Bentham, a sanction includes, besides the signification already indicated, a benefit accruing to an inferior by compliance with a command. According to Austin, a sanction necessarily denotes punishment. According to the other school, it includes also a reward. The latter is the theory accepted by the Mīmāṁsakas. According to them, Vidhis or commands are divided into three classes—*Nitya*, *Naimittika* and *Kāmya*. The injunctions of the

first two classes of Vidhis are compulsory, and a breach of them will be visited with a punishment including a sin. In the case of Kāmya Vidhis, the person bound by the injunction is one who desires to attain the benefit contemplated by the text. Whereas in the case of Nitya and Naimittika Vidhis the sanction contemplated by the command refers invariably to a punishment, in the case of Kāmya Vidhis the sanction is the reward procurable by a person following the precept contained in the commanding texts. The three corresponding equivalents in Sanskrit for the ideas of command, duty and sanction are *Vidhi*, *Dharma* and *Phala*. An analysis of the ideas conveyed by a command according to the Mīmāṁsakas will enable us to arrive at a comparative estimate of the ideas in the modern jurisprudence and in the ancient law. Vidhi conveys two ideas, *Artha Bhāvanā* and *S'abda Bhāvanā*. Artha Bhāvanā means the mental determination of a person to do a certain thing. S'abda Bhāvanā is a peculiar legal fiction under which a power to prompt another to action is supposed to inhere in the letter of the Vedic command. In the case of temporal commands proceeding from a superior and directed to an inferior, the propelling force is the intention of the superior. In the case of Vedic commands, since there is no author in strict theory, the intention of the superior must find a substitute to supply the

propelling force, and for that purpose the idea of S'abda Bhāvanā is postulated. Each of the said Bhāvanās has been described to possess three limbs, *Sādhya* or the result, *Sādhana* or the instrumentality and *Itikartavyatā* or procedure. In the case of S'abda Bhāvanā or the prompting force inhering in the letter of the Vedic command, the result is the mental determination of the person bound to follow a particular course of conduct, that is, Artha Bhāvanā. The instrumentality by means of which the propelling force becomes felt is the knowledge of the command, and the Itikartavyatā is a knowledge of the beneficial character of a particular course of conduct. In the case of an Artha Bhāvanā, the result is the benefit described to accrue from a particular conduct. The instrumentality by which the result is brought about is the pursuit of a particular course of conduct prescribed by a Vidhi which is usually the performance of a sacrifice or some such similar thing. The procedure which enables a particular act to become productive of the contemplated result is the going through of the numerous subsidiary formalities essential for the completion of the act.

Now we shall return to the examination of the view that a command is authoritative irrespective of the Sovereign. No doubt scores of texts can be found in our Smṛti literature commanding a Sovereign to do a certain thing much in the same

tone as of a command to a subject. But so far as the actual applicability of a Smṛti rule of Positive Law within a certain territorial extent is concerned, we have to determine its authority only in the light of its enforcibility. A certain rule is said to be binding because the Sovereign enforces it by the might of his will; but it does not necessarily presume that the Sovereign is the founder of the rule of law. As a matter of fact, our entire Smṛti literature is an instance of a body of rules which, at the time of their composition, were not backed by any political power, but which gradually grew to be binding codes of law by reason of the recognition accorded to them by the King. From a historical point of view no doubt the author of a text-book is more responsible for the idea than the Sovereign who enforces it, but in the view of the strict law, if we are to understand by the term law, only that body of rules which are acted upon in the administration of justice, we cannot help coming to the conclusion that the Austinian theory of the Sovereign being the ultimate foundation of law is the only view that stands the test of strict scientific analysis. At the same time, it would be absurd to contend that the view that the Sovereign is bound by the law equally with his subject, has absolutely no basis in our Śāstras. The conflict between the two theories has to be explained in the light of standpoints in which they differ. The one is

consistent with the standpoint of a moral legislator, and the other is the only possible view consistent from the strict standpoint of a positive legislator. From the broader ethical point of view, a King who transgresses a Smṛti injunction is as much blameworthy as any subject. In the eye of God, both are sinners in an equal degree, but within the narrow limits of Positive Law, the King is not subject to any superior authority. If the theory of the subjection of the King to the jurisdiction of the Smṛti rules is to be pushed even within the circumscribed limits of Positive law, the Smṛti rule relating to the comparative weight of the four heads of law by which a Sovereign's command is declared to be supreme and to over-ride the provisions of other classes of law is an emphatic argument against its soundness in principle. Now we have drawn attention to the correctness of the Privy Council dictum that under the Hindu system of law, clear proof of usage outweighs the written text of law. Although there is a conflict between this theory and the Mīmāṁsaka view that custom is inferior to an express text, the conflict has been explained by referring to the difference in standpoints; and we have also pointed out from a reference to the texts of Nārada, Bṛhaspati and Kātyāyana that within the province of Positive law in its practical application by courts of law, customs possess a superior authority to that of the Smṛtis.

Another reason that I would suggest in favour of the Privy Council dictum based upon discussions in Mīmāṁsā is that the authority of usages as well as of Smṛti texts is itself ultimately based upon their acceptance by the community at large. The presumption of an inferential Vedic text in the case of either a Smṛti or a custom is engendered by the idea of S'iṣṭatraivarṇikaparigraha so that the fundamental basis of the authority of Smṛtis and customs is really the recognition by the public rather than a foundation in the Vedas. It therefore follows that a custom which has been acted upon uniformly from time immemorial by the majority of the public with the consciousness of its validity has a greater binding force than the common law of the land with reference to the practical administration of justice.

FIFTH LECTURE

In this lecture, I propose to deal with the development of Hindu Law from the original texts effected under the guise of interpretation. As already pointed out in the previous lectures, the fountain source of all law under the Hindu jurisprudence is the Veda. Although in reality there is very little of Positive law worth mentioning in the Vedas, the theory is strictly kept up that the Smṛti codes and commentaries and digests of a later epoch are mere reproductions of the Vedic Law condensed and presented in an attractive manner for the convenience of the reader. If one is not able to trace the Vedic source of a particular Smṛti text or a modern rule exclusively laid down in the comparatively modern commentaries and digests, it is his own imagination that is at fault. If one is possessed of sufficient legal acumen and makes sufficient research work, the Vedic source must inevitably be within his reach. This is not a doctrine peculiar to the Hindu jurisprudence. This fictitious notion of the all-comprehensiveness of the archaic law has obtained from time immemorial in the jurisprudence of other nations.

In the Roman Law the theory held steadfast to the fiction that the highly complicated code of the latter day Roman jurisprudence was nothing more nor less than what was laid down in the Law of the Twelve Tables. From the meagre foundations of the primitive Roman Law as contained in the Twelve Tables, later Roman jurists never found it hard to propound their own views, and establish that they had been drawn from the Twelve Tables. The opinions of the jurists as to the interpretation of the primitive law of Rome gave rise in course of time to a voluminous body of rules known as *the answers of the learned.* The Roman *Responsa Prudentium* which thus succeeded in evolving a highly developed code of law from the very meagre germs in the Twelve Tables had its counterpart in the history of the English law, namely, the English case-law as developed by judges in the courts of common law and equity. The fact is that the English judge actually legislates to a limited extent; the theory is that he merely declares the law that is already in existence. The steps by which this judicial legislation is achieved are imperceptible. But judging from the result, a comparison of the law ultimately arrived at after its going through the mould of judicial decisions and of the law before the same was touched by the hand of a judge will reveal a striking contrast between the two so that it is almost incredible to

conceive of the one as having been derived from the other. The first inroad upon a rule of common law is attempted to be made by surreptitious means, but when that is made, the original rule of law is always taken along with the limitation or extension with which it has been impressed by the stamp of judicial decision. The next step effectuates a further development of the law by introducing a further limitation or extension. In the result when a particular rule of law completely passes through the mould of judicial legislation, the ultimate rule arrived at is not clearly traceable to its source. In the same way, under the Hindu jurisprudence the Sanskrit commentaries and digests simply purported to propound the already existing law. The very diversity of opinion so frequently met with among the commentaries and digests indicates rather that the author is actuated by a desire to discover a legal warrant for the customs and practices of the province in which he flourished from the original sources than that to interpret the law to the best of his lights. If from the same Smṛti rules the author of Mitākṣarā establishes the right of sons by birth in the family property, and the author of Dāyabhāga finds out that the son's right accrues on the death of the father, how else can the diversity of juristic opinions be accounted for, than by a reference to the prevalence of different customs in different provinces? And, it is not also correct to say

that the commentator started with a set of accepted notions, and tried to introduce them into the law of the land. His attempt has been rather to interpret the law in a reasonable manner, but with a view to harmonise it with prevailing customs. To achieve this end, he slily introduces a modification into the original law by professing to bring out its hidden meaning. An author of a later day takes the hint, and improves upon it, and this process goes on until as in the case of the English case-law the final rule of law of the latest author on a particular point differs very widely from its originating source. The fiction of interpretation is thus seen to be strictly maintained in the three systems of Jurisprudence known to us, namely the Roman, the English, and the Hindu systems. But one interesting distinction among the three systems deserves notice; whereas the authority of the English case-law is derived from the Bench, that of the Roman *Responsa Prudentium* and the Sanskrit commentary is derived from the Bar. While in England the development of law is left entirely to the exigencies of disputes actually arising for adjudication, in India and at Rome it was possible for the jurist to evolve a coherent and homogeneous body of law without reference to actually contested cases. While the theory is the same in all the three systems, namely, that the English judge or the Roman jurist or the Sanskrit commentator is absolutely incapable of altering one

jot or one line of existing jurisprudence, the fact is that through his instrumentality the law has been considerably extended, modified or improved upon. This observation is all the more true with reference to the development of Hindu Law, for, as distinguished from the jurisprudence of other countries wherein the Sovereign has purported to legislate by means of new enactments, the Indian Jurisprudence has been practically left to work out its own evolution without the conscious interference of the Sovereign. In the history of India we rarely meet with instances of legal enactments in derogation of the Vedic or Smṛti law. Of course, the Hindu Law as contained in Sanskrit works might or might not have been administered by the Sovereign of the land, be he an Indian, or an alien conqueror, ruler or invader, but when the Hindu Law was intended to be enforced as such, the ruler had always been guided by Sanskritic rules, and never desired to import his own ideas into it.

Of the various phases in which interpretation has wrought its influence on the spontaneous development of Hindu Law, the most prominent is the theory of *Ekavākyatva.* The influence of this theory is far-reaching, and has affected almost every branch of the legal literature. If one is asked to cite an instance of a legal fiction in Hindu Law, the most prominent one that strikes the mind is the theory of the unity of idea between the different sources of

Hindu Jurisprudence. Absolute unanimity of opinion is conclusively presumed to prevail even among obviously conflicting sources of law. The fiction of absolute concord between the different legal sources is all the more strengthened by the peculiar theories as to the origin and foundation of those sources themselves. The fundamental theoretical source of Hindu Law is, as we all know the Veda. In the Vedic literature itself, there are a number of works which belong distinctly to different stages in the development of early Sanskrit literature. Modern critics dogmatise that certain Vedas are the outcome of the effusions of the primitive human heart, and certain others which elaborate on the law of the ceremonial belong to a later age of Brahmin ascendancy. Certain other tests are also laid down in the modern works on the history of Sanskrit literature to distinguish between an ancient text and a modern text, and to ascribe different dates to different Vedic texts. Of course the difference of opinion as to the chronology is an inevitable factor, but it is agreed that the Vedic literature in its entirety does not represent the production of a single age. As against this theory, we have the fiction of a superhuman origin of the Vedas. Whether the ultimate author of the Veda is supposed to be the Divine Being, or the Veda is presumed to be as eternal and devoid of a beginning as God himself, the purport underlying the

innumerable passages of the Vedic literature is single, and there is no possibility of a conflict.

This theory of Ekavākyatva may be viewed in its different aspects. Firstly, a unity of idea is presumed to exist between one Veda and another; next, as between one recension and another recension of the same Veda; next, between one Smṛti and another Smṛti; then, between the entire Vedic and Smṛti literatures; and last but not the least, between Veda, Smṛti and custom. Of the Vedas there are four: Ṛk, Yajus, Sāman, and Atharvan. The first three are collectively known as the *Trayī*, and in matters relating to Dharma, the author of Kaustubha states on one occasion that the Atharvan is of comparatively inferior authority to the Trayī. As regards the different recensions of the four Vedas, works of authority refer to twenty-one śākhās of the Ṛg Veda, one hundred and one śākhās of the Yajurveda, one thousand śākhās of the Sāmaveda, and two śākhās of the Atharvaveda. Of Smṛtis, there are, besides several other minor smṛtis, eighteen principal smṛtis. Some of them are written in the aphoristic prose style, and others in the verse style of the anuṣṭubh metre. The important Smṛtis written in the Sūtra style are Gautama, Āpastamba, Bodhāyana, and Vasiṣṭha. Smṛtis of the prose style are anterior in date to metrical Smṛti works of which the following may be mentioned as important: Manu, Atri, Viṣṇu, Hārīta, Yājñavalkya, Uśanas, Aṅgiras,

Yama, Saṁvarta, Kātyāyana, Bṛhaspati, Parāśara, Vyāsa, Śaṅkha and Likhita, Dakṣa and Śātātapa.

It is important to notice the reasoning adopted by the Mīmāṁsakas in establishing absolute harmony between the different texts of the Vedic literature. The grand aim of the entire Veda is the elucidation of Dharma, and Dharma is a thing that can be known only through a Vedic command. Therefore the really operative part of the Vedic literature is confined within the narrow range of texts coming within the definition of a Vidhi. Just as a Vidhi is operative by virtue of the obligation that it imposes upon a certain person to do a certain act, a Pratiṣedha is also operative as an injunction restraining a person from doing a particular act, and in fact Pratiṣedha is generally included in the Vidhi. Barring the Vidhi and Pratiṣedha portions, the total residue of the Vedic literature is not authoritative by itself. Its authority is subservient to that of the Vidhi of which it forms an adjunct. Of the three categories of Vedas forming the residue of the Vedic literature, namely, Mantra, Arthavāda and Nāmadheya, the last may be disposed of first. It consists of the technical names of acts enjoined by the Vidhi portion. The function of a Mantra is to praise the God for whose propitiation a thing commanded by a Vidhi is performed, and it therefore serves the purpose of recalling to mind the deity who is a subsidiary to an act enjoined by a Vidhi

The Arthavāda portion has been already explained as consisting of texts commendatory or condemnatory of acts enjoined or prohibited by the Vidhis of which it is a supplement. As regards the different recensions of the same Veda, the principle underlying the construction of Vedic texts as enunciated in the *S'ākhāntarādhikaraṇa* of Pūrva Mīmāṁsā is to the effect that all S'ākhās speak with one voice, and there is identity of subject matter in them subject of course to variations and additions intended for the observance of the followers of the particular S'ākhās in which they are laid down. The principle is illustrated by their treatment of Agnihotra referred to in two different S'ākhās. The question is discussed, whether the Agnihotra dealt with by one S'ākhā is different from the Agnihotra mentioned in a different S'ākhā, and the conclusion arrived at is that both of them relate to the same ritual.

If we leave aside for a moment the development of law during the Vedic age, and come to the Smṛti era of legal literature, the first point that claims our attention is that the theory of Ekavākyatva between the different Smṛtis rests on much less substantial grounds than in the Vedas. Exactly divergent views are propounded by different Smṛtis, but they are all supposed to voice forth the same idea. While the divergence in views affords ample material for a legal historian to trace the evolution of ideas from one stage to another and to construct

a wonderful edifice of Hindu legal history, it is totally ignored by the orthodox lawyer engaged in expounding law from the original sources to the lay public. If Manu permits a Brahmin to take wives from all the four castes, and the later Yājñavalkya permits the taking of wives from the three higher castes alone, and if in the still later Smṛtis and commentaries the rigid principle of marriage within one's own caste is laid down, does it not point at least to three different stages in the development of matrimonial law from the earliest stages down to the present day? A historical lawyer will easily perceive the modifications that the law has undergone through its different stages. But the practical lawyer strenuously professes to perceive exact identity of ideas in the three different stages of law. With regard to the practice of Niyoga, the view set out in the most ancient works of authority is in favour of a lenient application of the practice. In the next stage, various limitations are introduced with the result that at the end of the second stage we actually meet with the view that the practice is prohibited in the Brahmin caste; and at the last stage in the history of this practice we meet with inevitable signs of its general decline, and it is actually prohibited for all castes. It is easy to multiply examples from the laws of procedure, limitation, delict, contract, crimes and other branches of Hindu Law, a detailed description of which will not strictly

fall within our province, as their appropriate place will be only in a general history of the Hindu Law. When we have thus before us a number of Smṛtis of conflicting views, the law to be gathered from them when the age of Smṛtis is past is moulded to a large extent by the principle of Ekavākyatva. The theory of absolute harmony between Smṛtis necessitates a restricted application of the different Smṛtis either to different castes or to different ages. As an illustration of the influence of the theory of Ekavākyatva upon the development of law by means of restricted application may be cited the rule laid down by Parāśara in the following text:

[1] कृते तु मानवा धर्मास्त्रेतायां गौतमाः स्मृताः ।
द्वापरे शाङ्खलिखिताः कलौ पाराशरः स्मृतः ॥

In the Kṛta age Manu's laws are observed, in Treta those of Gautama, in the Dwāpara those of S'aṅkha and Likhita, and in the Kali age that of Parās'ara. This rule restricting the application of different Smṛtis to different ages has never been followed as a hard and fast rule. The only purpose that it serves is to support the view of any commentator in the matter of preferring one Smṛti to another whenever it suits his purpose. As a matter of fact, the code of Yājñavalkya is followed as a binding code of law at the present day much more than the

[1] *Parās'ara Smṛti*, Adhyāya 1, S'loka 24.

code of Parāśara which is declared in the above text to be of superior authority in the Kali age. Commentators and digest-writers refer indefinitely to all Smṛtis without caring a bit for the rule of restricted application with reference to ages which is more honoured in its breach than in its observance. The extreme disregard in which this rule of restricted application is held is best illustrated by the text of Parāśara which legalises the remarriage of women on five different occasions, namely, when the husband is lost, or unheard of, when he is dead, when he renounces the world, when he is a eunuch, and when he has proselytised.

[1] नष्टे मृते प्रव्रजिते क्लीबे च पतिते पतौ ।
पञ्चस्वापत्सु नारीणां पतिरन्यो विधीयते ॥

Another direction in which the rule of Ekavākyatva has contributed its mite towards the evolution of legal ideas is exemplified by the statement frequently to be met with in the commentaries and digests that certain practices are prohibited for the Kali age. The very fact that a text recites that certain practices are forbidden for the modern age shows that the author thereof lived in a transitional stage when the practices in question died out and became obsolete—a fact which is of immense importance to a historian of Hindu Law.

[1] *Parāśara Smṛti*, Adhyāya 4, Śloka 30.

The following text illustrates the influence brought about by the theory of Ekavākyatva in this particular aspect :

[1] ऊढायाः पुनरुद्वाहं ज्येष्ठांशं गोवधं तथा ।
कलौ पञ्च न कुर्वीत भ्रातृजायां कमण्डलुम् ॥
[1] असवर्णासु कन्यासु विवाहश्च द्विजातिषु ।
दत्तौरसेतरेषां तु पुत्रत्वेन परिग्रहः ॥

The remarriage of an already married woman, an unequal division of estate with an extra share in favour of the eldest, the sacrifice of a cow, intercourse with a deceased brother's wife by Niyoga, and Kamaṇḍalu or the adoption of the fourth Āsrama—these five things one ought not to do in the Kali age. Similarly, marriage among the twice-born classes with girls of different castes, and the recognition, as sons, of persons who are neither adopted nor born of one's own body.

Texts of this sort bear clear indications of the transitional stage in the development of the Hindu Law. There are also texts which evidence that at particular stages in the advancement of civilisation, the Hindu sages convened assemblies and definitely abrogated certain practices which had obtained previously; and in support of this theory the following text may be cited :

[1] *Parāsara Mādhavīya*, *Ācārakāṇḍa*, Adhyāya 1, under Sloka 34.

[1] एतानि लोकगुप्त्यर्थं कलेरादौ महात्मभिः ।
निवर्तितानि कर्माणि व्यवस्थापूर्वकं बुधैः ॥

At the beginning of the Kali age, for protecting the world, these practices were repealed by convention by the high-souled and the wise.

Of the various influences at work in shaping the destinies of the Hindu jurisprudence as a consequence of the fiction of Ekavākyatva, one of the most important is to be seen in the reasoning adopted occasionally by commentators for preferring one possible interpretation of a text to another on the ground that one is countenanced by custom and the other is not. Frequently commentators refer to *Samācāravirodha* or conflict with usage as a salutary ground for rejecting a particular construction of a text. This reasoning is purely the creature of the fiction of absolute harmony between the written text-law and the customary law of the land; for, the theory is that a custom is not valid merely as a custom but as a rule of law lurking behind the letter of the law. The immense influence exercised by the theory of Ekavākyatva between text-law and usage can best be brought home to the mind of the reader by citing a few illustrations from Mitākṣarā from the chapter on partition of heritage. A text of Yājñavalkya runs thus :

[1] *Parāśara Mādhavīya*, *Ācārakāṇḍa*, Adhyāya 1, under Śloka 34.

[1] विभागं चेत्पिता कुर्यादिच्छया विभजेत्सुतान् ।
ज्येष्ठं वा श्रेष्ठभागेन सर्वे वा स्युः समांशिनः ॥

If a father effects a partition, he should divide the estate among his sons at his will so as to give an extra share to the eldest or to make all equal partakers.

In a partition during the lifetime of the father, Yājñavalkya states two different ways in which family property can be divided. One is called unequal partition or *Uddhāravibhāga* whereby the eldest is given a larger share than the rest. Minute rules are laid down for regulating the extra shares to which a brother higher in rank is entitled than the other. The text itself does not state whether the option given to the father by this text holds good to all family property or to that of the father's self-acquisition. The main reason assigned by the author of Mitākṣarā for rejecting the validity of an unequal partition of family property is that it is not countenanced by popular usage, and that therefore it ought not to be given effect to although sanctioned by S'āstras. He supplements his reasoning by citing instances of practices sanctioned by S'āstras but illegal on account of popular condemnation. The serving of the meat of a bull or a sheep to a learned Brahmin guest, and the sacrifice of a cow in

[1] *Yājñavalkya Vyavahārādhyāya*, S'loka 114.

propitiation of Mitrāvaruṇa, and the procreation of offspring to a deceased brother by the practice of Niyoga are the illustrations cited in support of the reasoning that a thing sanctioned by S'āstras is nevertheless illegal if it is opposed to custom. The passage of the Mitākṣarā setting out this discussion runs as follows:

[1] अत: सर्वस्मिन्नपि काले विषमो विभागोऽस्तीति कथं सममेव विभजेरन्निति नियम्यते । अत्रोच्यते । सत्यम् अयं विषमो विभाग: शास्त्रदृष्ट: तथापि लोकविद्विष्टत्वान्नानुष्ठेय: । अस्वर्ग्यं लोकविद्विष्टं धर्म्यमप्याचरेन्न तु । इति निषेधात् । यथा महोक्षं वा महाजं वा श्रोत्रियायोपकल्पयेत् इति विधानेऽपि लोकविद्विष्टत्वात् अननुष्ठानम् । यथा वा मैत्रावरुणीं गां वशामनूवन्ध्यामालभेत इति गवालम्भनविधानेऽपि लोकविद्विष्टत्वादननुष्ठानम् । उक्तं च— 'यथा नियोगधर्मो नो नानूवन्ध्यावधोऽपि च । तथोद्धारविभागोऽपि नैव सम्प्रति वर्तते ॥' तस्मात् विषमो विभाग: शास्त्रदृष्टोऽपि लोकविरोधात् श्रुतिविरोधाच्च नानुष्ठेय इति सममेव विभजेरन् इति नियम्यते ।

Therefore as an unequal partition is met with at all times, how is it sought to be restricted that they shall partition only equally? The answer is this. Of course this unequal partition is sanctioned by S'āstras, yet it ought not to be observed as it is disliked by the world, for, there is a prohibition that

[1] *Mitākṣarā Vyavahārādhyāya*, under S'loka 117.

one ought not to do a thing disliked by the world although sanctioned by S'āstras if it does not lead to heaven. For example, in spite of the command that one ought to serve a learned man with a bull or a goat, the rule is not followed as the act is condemned by the world; and similarly in spite of the command of the killing of a cow by the text 'one ought to sacrifice a barren cow to propitiate Mitrāvaruṇa in the Anūvandhyā,' the rule is not acted upon as it is disliked by the world. In support of this position there is the following text. 'Just as the practice of Niyoga does not exist, and just as the sacrifice of a cow is now obsolete, so also an unequal partition has ceased to be.' Therefore an unequal partition, although sanctioned by S'āstras, ought not to be observed as being obnoxious to the popular taste and contrary to the Veda, and this is why it is restricted that they shall partition only equally.

Another instance of the same principle is to be seen in the interpretation adopted by Mitākṣarā of the following text of Yājñavalkya:

[1] पितृद्रव्याविरोधेन यदन्यत्स्वयमर्जितम् ।
मैत्रमौद्वाहिकं चैव दायादानां न तद्भवेत् ॥
क्रमादभ्यागतं द्रव्यं हृतमप्युद्धरेत्तु यः ।
दायादेभ्यो न तद्दद्याद्विद्यया लब्धमेव च ॥

[1] *Yājñavalkya Vyavahārādhyāya*, S'lokas 118 and 119.

Whatever else is acquired by one's own self without detriment to paternal estate, that which is acquired by means of friends or in matrimony shall not be available to coparceners. He who reclaims a property come in regular descent but claimed adversely by another shall not give the same to coparceners, nor shall one give them what is earned by means of learning.

With regard to acquisition from friends, etc., the natural interpretation that one is apt to conclude from the fact of specific mention apart from that which is acquired without the help of patrimony would be that in the case of acquisitions thus specifically mentioned they are not divisible among brothers whether earned with or without the help of joint property. Such an interpretation is expressly negatived in the Mitākṣarā by adducing the reason of Samācāravirodha. The possibility of the above interpretation and its repudiation are thus set out in the Mitākṣarā.

[1] अथ पितृद्रव्यविरोधेनापि यन्मैत्रादिलब्धं तस्याविभाज्यत्वाय मैत्रादिवचनमर्थवदित्युच्यते तथा सति समाचारविरोधः

It might be urged that the specific mention of acquisition from friends, etc., has got a purpose, namely, to declare as impartible a property

[1] *Mitākṣarā Vyavahārādhyāya*, under S'lokas 118 and 119.

acquired from friends, etc., even at the expense of patrimony. If so, there will be a contravention of custom.

On the authority of the same text, Mitākṣarā states that a property acquired by gift is divisible among coparceners on the ground of custom, and therefore the first clause namely 'whatever else is acquired without detriment to the paternal estate' must be taken as descriptive of the classes of acquisitions mentioned subsequently, and not as denoting a separate class of impartible properties. The passage of Mitākṣarā on the point runs as follows:

[1] तथा पितृद्रव्याविरोधेनेत्यस्य भिन्नवाक्यत्वे प्रतिग्रहलब्धस्य अविभाज्यत्वं आचारविरुद्धमापद्येत ।

If the clause 'without detriment to patrimony' is treated as a separate clause, a property acquired by gift will become indivisible, quite contrary to custom.

A typical illustration of the far-reaching influences of the theory of absolute unity of voice between one Smṛti and another can be drawn from the Sanskritic law of procedure. Rules of procedure which clearly belong to a later stage in the development of the Hindu judiciary are read into texts of earlier times by commentators. The ancient rules of procedure are comparatively much simpler than

[1] *Mitākṣarā Vyavahārādhyāya*, under S'lokas 118 and 119.

those laid down in modern Smṛti works which evidence a highly complicated system of procedure which came into existence mainly as a result of the growth of the law of presumptions. The truth of this statement will best be realised by a reference to the following text of Yājñavalkya from the chapter on General Procedure and its interpretation by Mitākṣarā :

[1] प्रत्यर्थिनोऽग्रतो लेख्यं यथावेदितमर्थिना ।
समामासतदर्धाहर्नामजात्यादिचिह्नितम् ॥
श्रुतार्थस्योत्तरं लेख्यं पूर्वावेदकसन्निधौ ।
ततोऽर्थी लेखयेत्सद्यः प्रतिज्ञातार्थसाधनम् ॥

A plaintiff shall cause to be recorded in the presence of the defendant (his case) as previously informed by him with the particulars of year, month, fortnight, day, name, caste, etc. An answer to the plaint read out shall be written in the presence of the plaintiff. Then the plaintiff shall at once cause to be recorded the proof by means of which he proposes to establish his case.

From the above passage and on a comparison with other texts of the same chapter, it is evident that the word *Arthin* has been used by Yājñavalkya throughout as meaning a plaintiff. Mitākṣarā gives a different turn to the text imposing upon a plaintiff an obligation to set out his proof first. The author

[1] *Yājñavalkya Vyavahārādhyāya*, S'lokas 6 and 7.

interprets the text as meaning that the duty of adducing evidence lies upon the person upon whom the burden of proof lies. He refers to a fourfold classification of the causes with reference to the nature of the pleas put forward by the defendant. A defendant may admit the plaintiff's claim, or he may deny totally the case of the plaintiff, or he may admit the facts of the plaint but deny liability by reason of discharge, payment, release, etc., or he may plead *Res Judicata*. The Sanskrit equivalents of the four kinds of pleas are thus mentioned in the following text of Kātyāyana.

[1] सत्यं मिथ्योत्तरं चैव प्रत्यवस्कन्दनं तथा ।
पूर्वन्यायविधिश्चैवं उत्तरं स्याच्चतुर्विधम् ॥

Where the claim is admitted, there is no need for proof on either side. When the facts stated in the plaint are denied, the burden of proving the case lies on the plaintiff. In cases where the other two classes of pleas are set up, it lies on the defendant to make out his pleas. This is the state of the law as described by Hārīta by whose time a body of rules has sprung up regulating burden of proof which played an important part in its turn to develop the law of procedure on the lines indicated above. This is apparent from the following text of Hārīta :

[1] *Mitākṣarā Vyavahārādhyāya*, under S'loka 7.

[1] प्राङ्न्यायकारणोक्तौ तु प्रत्यर्थी निर्दिशेत्क्रियाम् ।
मिथ्योक्तौ पूर्ववादी तु प्रतिपत्तौ न सा भवेत् ॥

Where *Res Judicata* or non-liability is pleaded in defence, the defendant shall make out his case. When the facts of the plaint are totally denied in the defence, the plaintiff shall establish his case. Where the plea is one of admission no proof is necessary.

In the light of the rules laid down by this text, the text of the ancient Yājñavalkya is construed by Mitākṣarā so as to make a clear departure from the plain meaning intended by the sage. Yājñavalkya could not be understood to have meant to lay down anything but the simple rule that the plaintiff must prove his case. But according to the interpretation given by Mitākṣara, the word Arthin is taken to mean not a plaintiff, but one on whom the burden of proof lies. Whether the text of Hārīta is itself the result of the influence of the advanced law of presumptions upon the interpretation of Yājña-valkya's text, or the Mitākṣarā interpretation is due to a conscious attempt at harmonising the texts of Yājñavalkya and Hārīta, it is certain in any event that the theory of Ekavākyatva or singleness of purpose among Smṛtis of different ages has played an important part in moulding the text-law relating to procedure and presumptions.

[1] *Mitākṣarā Vyavahārādhyāya*, under S'loka 7.

A glaring instance of a case where the original law of Smṛtis has been materially altered under the guise of interpretation can be drawn from the Sanskritic law of limitation as laid down by Yājñavalkya and interpreted by Mitākṣarā. The principal text of Yājñavalkya laying down the limitation for suits to recover movable and immovable properties is the following:

[1] पश्यतोऽब्रुवतो भूमेर्हानिर्विंशतिवार्षिकी ।
परेण भुज्यमानाया धनस्य दशवार्षिकी ॥

The plain meaning of this text is that when an immovable property is enjoyed by a stranger claiming adversely to the owner uninterruptedly for a period of twenty years, the title of the owner is extinguished, and the ownership of movable property will be extinguished by adverse possession in a similar manner for a period of ten years. That this ought to be the meaning of Yājñavalkya's text will be clear on a comparison of the same with the parallel texts of other Smṛtis. Manu says:

[2] यत्किंचिद्दशवर्षाणि सन्निधौ प्रेक्षते धनी ।
भुज्यमानं परैस्तूर्ष्णीं न स तल्लब्धुमर्हति ॥
अजडश्चेदपोगण्डः विषये चास्य भुज्यते ।
भग्नं तद्व्यवहारेण भोक्ता तद्द्रव्यमर्हति ॥

[1] *Yājñavalkya Vyavahārādhyāya*, S'loka 24.
[2] *Manu*, Adhyāya 8, S'lokas 147 and 148.

"(But in general) whatever (chattel) an owner sees enjoyed by others during ten years, while though present, he says nothing, that (chattel) he shall not recover. If (the owner) is neither an idiot nor a minor, and if (his chattel) is enjoyed (by another) before his eyes, it is lost to him by law; the adverse possessor shall retain that property."

Gautama says:

[1] अजडापोगण्डधनं दशवर्षभुक्तं परैः सन्निधौ भोक्तुः ॥

The chattel of one who is neither an idiot nor an infant, enjoyed for ten years by others in the presence of the owner shall belong to the possessor.

In interpreting the principal text of Yājñavalkya, Vijñānes'vara refers to this ordinary meaning, refutes it, and gives a new meaning of his own in the passage beginning with

[2] तस्मादस्य श्लोकस्य सत्योऽर्थो वक्तव्यः ।

'Therefore the true meaning of this verse ought to be said.' Then he goes on to say that the text limits the time for the institution of a suit for the recovery of mesne profits or damages and not of the property itself. The reason why he adopts this construction is a desire to harmonise this text of Yājñavalkya with a comparatively modern Smṛti text which recites:

[1] *Gautama Dharma Sūtra*, Adhyāya 12, Sūtra 34.
[2] *Mitākṣarā Vyavahārādhyāya*, under S'loka 24.

[1] अनागमं तु यो भुङ्क्ते बहून्यब्दशतान्यपि ।
चोरदण्डेन तं पापं दण्डयेत्पृथिवीपतिः ॥

The Lord of earth shall punish that wicked man, with a thief's punishment, that enjoys property without title for even many hundreds of years. Later treatises like Parāśara-Mādhavīya and Vyavahāra-Mayūkha, of course, follow the track of Mitākṣarā in construing Yājñavalkya's text regarding the law of limitation.

Besides the theory of Ekavākyatva, an important process by which the law has been developed by means of interpretation is the application of rules regarding a particular topic *in toto* or *mutatis mutandis* to topics which bear a close analogy to it. The extension of rules from one subject to an allied analogous subject is known by the name of *Atideśa* under the Mīmāṁsaic terminology. Certain other technical conceptions follow as a necessary consequence of the principle of Atideśa, and to this class of ideas belong the conceptions of *Pratinidhi*, *Ūha* and *Bādha*. Without entering into the details of ritualistic texts with which the ideas of Atideśa, Pratinidhi and Ūha are inextricably mixed, a summary of the general principles involved therein, will enable us to realise how from small beginnings the law has considerably expanded by extension and analogy.

[1] *Mitākṣarā Vyavahārādhyāya*, under Śloka 24.

With regard to the first of the ideas referred to here, *viz.*, Atideśa, at the outset it is to be noted that it is the peculiar process of formulating rules of procedure to be observed in the performance of Vikṛtis or copy sacrifices on the analogy of Prakṛtis or model sacrifices. Although the idea is thus seen to belong exclusively to the law of the ritual, the general principle may be gathered that where there is a principal branch of law representing a complete code of rules, and there is another branch of law which is closely analogous to the former but does not contain a sufficient number of rules within itself, the rules of the former may be extended to the latter unless there is anything repugnant in the context. The principle of extension of rules by analogy is described to manifest itself in various forms which are treated in Mīmāṁsaic works as sub-divisions of Atideśa. Atideśa is divided into two broad classes, namely, *Vacanātideśa* or extension by express or implied statement and *Nāmātideśa* or extension by reason of identity of nomenclatures. *Agnihotra* is the name of a compulsory sacrifice to be performed daily.[1] In the sacrifice known as Kauṇḍapāyināmayana, there is a text which commands the performance of Agnihotra, but the rules of procedure for the Agnihotra are not set forth. The question is, how is it to be performed. The answer is that by reason of the identity of names

[1] *Bhāṭṭadīpikā*, 7, 3, 1.

between the compulsory Agnihotra and the Agnihotra comprised in the Kauṇḍapāyināmayana, the latter draws all the rules of its procedure from the former. The answer is sound in principle, for when a legislator chooses to designate two different branches by the same name the intention is apparent that both have got an intimate connection with each other, and it is therefore reasonable to supply the deficiencies in the one by borrowing largely from the other. This is the principle known as Nāmātideśa, but in applying this principle, great caution will have to be bestowed in distinguishing between a nomenclature and a mere description. If the same descriptive word is used with reference to two different topics it does not follow that the principle of Atideśa is to be resorted to. In the twelve-day sacrifice, a sacrifice is enjoined to be performed on the first day, and it is described as *Prāyaṇīya*. In the Gavāmayana sacrifice, a sacrifice is enjoined which is also known as *Prāyaṇīya* by the text :

[1] वैश्वानरो ज्योतिष्टोमः प्रायणीयमहर्भवति ।

A doubt is raised whether the subsidiaries of the former are inherited by the latter by reason of the word Prāyaṇīya being applied to both the sacrifices. The answer is that the word in question is not a technical name, but a mere description and capable of an etymological explanation. It is pointed out

[1] *Bhāṭṭadīpikā*, 7, 3, 2.

that the word Prāyaṇīya literally means 'that which goes first,' and as the two sacrifices in question are to be performed at the outset of the groups to which they respectively belong, the employment of the term is justified, and there is therefore no need for presuming any connection between the two. But when a name used in two model sacrifices is repeated in connection with another sacrifice where no subsidiaries are specifically enjoined, the answer to the question, from which of the two original sacrifices does the latter derive its details, must be given by an investigation into the question, 'as between the two original sacrifices, in which case is the word in question employed in its primary sense'. An illustration will make this principle clear. The word *Avabhṛtha* is used to denote a ceremony in the Somayāga in its primary sense. In its secondary meaning the word is used to denote the ceremony of sprinkling of water in the New Moon and Full Moon sacrifice. In a sacrifice known as Varuṇapraghāsa which is deemed to be a Vikṛti of the New Moon and Full Moon sacrifice, the text :

[1] वारुण्या निष्कासेन तुषैश्चावभृथं यन्ति ।

enjoins the performance of an Avabhṛtha. On the principle stated above, the conclusion supports the theory that it is the subsidiaries of the Avabhṛtha belonging to the Somayāga that are attracted to the

[1] *Bhāṭṭadīpikā*, 7, 3, 4.

Varuṇapraghāsa sacrifice. At the same time it is to be noted that the mere repetition of the same word for the employment of which there are distinctly two separate motives will not by itself be sufficient for the application of the principle of Nāmātideśa. For example,[1] the word Vaiṣṇava is used with reference to a sacrifice in the Soma as well as Rājasūya. The word simply means that in both cases the sacrifice is performed for the propitiation of God Viṣṇu. Such a one is not a proper case for extension by Nāmātideśa. Where a particular word is used in passages relating to two principal sacrifices without the distinction of one being primary or secondary, and the same word for which no other purpose can be gathered from the context is used in a passage relating to a sacrifice which is otherwise known to be modelled upon one of the two principal sacrifices, the word is to be taken as referring to the identical idea that is expressed in the principal model sacrifice. In the sacrifice known as Cāturmāsya which is a Vikṛti of Darśapūrṇamāsa there is a text [2] द्वयोः प्रणयन्ति । which is frequently referred to in the Dharma śāstra works including Mitākṣarā. The text means 'In two they kindle the fire'; in other words, in two of the four groups Praṇayana is performed. A question is raised whether the Praṇayana or the Kindling

[1] *Bhāṭṭadīpikā*, 7, 3, 5.
[2] *Ibid.*, 7, 3, 7.

ceremony imports the rules of the corresponding Praṇayana ceremony of the Soma sacrifice or merely repeats the Praṇayana otherwise derived from its original. On the principle suggested above, the former view is negatived.

More important than the extension by Nāmātideśa is that by statement, express or implied. There are certain sections of the law which expressly lay down that the rules relating to a particular branch shall be applied as far as possible to another branch. The Vedic illustration for the extension of rules by means of express statement may be drawn from the text:

[1] एतद्ब्राह्मणान्येव पञ्च हवींषि यद्ब्राह्मणानीतराणि ।

This text occurs in the Varuṇapraghāsa chapter. There are five Havis sacrifices enjoined in Vaiśvadeva with full particulars of the subsidiary ceremonies. The entire passage dealing with the said five ceremonies in Vaiśvadeva is directed to be read as part and parcel of the chapter relating to the five Havis sacrifices in the Varuṇapraghāsa. This is an example of extension by express legislation. Another typical instance of express extension is the text:

[2] समानमितरच्छ्येनेन ।

The rest resembles the Śyena sacrifice.

[1] *Bhaṭṭadīpikā*, 7, 1, 3.
[2] *Ibid.*, 7, 1, 2.

This text occurs in the passage relating to a sacrifice known as *Iṣu*. After expressly enjoining the performance of certain ceremonies the rest is directed by this text to be performed as in the S'yena sacrifice. An illustration of this principle may be cited from the following text of Manu :

[1] योऽदत्तादायिनो हस्ताल्लिप्सेत ब्राह्मणो धनम् ।
याजनाध्यापनेनापि यथा स्तेनस्तथैव सः ॥

A Brahmin that desires to obtain wealth by officiating as priest or by teaching, from the hand of a person who takes what was not given him is like a thief.

This is referred to in the Mitākṣarā as *Stenātides'a*, and a person coming within the purview of this rule shall be punishable like a thief.

Atides'a on the footing of implied statement or *Kalpitavacanātides'a* is threefold :

[2] सादृश्यकल्पितवचनातिदेशः स्थानापत्तिकल्पितवचनातिदेशः आश्रयोपस्थितिकल्पितवचनातिदेशश्चेति ।

Atides'a by analogy, Atides'a by reason of position and Atides'a on account of Ās'raya. The first of these three principles is also known as *Codanāliṅgātides'a*. It applies where there are two sacrifices intimately resembling each other in respect of the material used

[1] *Manu*, Adhyāya 8, S'loka 340.
[2] *Bhāṭṭadīpikā*, 7, 1, 1.

therein or of the deity for whose propitiation they are performed. The relationship between two such sacrifices is that of model and copy. The sacrifice in connection with which the procedure is laid down in minute detail is said to be Prakṛti or model, and the other is said to be Vikṛti or duplicate. *Sthānāpattyatideśa*[1] applies where a certain thing in the Vikṛti sacrifice takes the place of a corresponding thing in the Prakṛti. For instance, a small pivot fixed to the ground named Khalevālī is described as taking the position of Yūpa or the sacrificial pillar. By reason of the place it occupies, it is to be prepared, affixed to the ground and used in the sacrifice in much the same way as the Yūpa with all the subsidiary ceremonies of the latter as far as possible. The next type of Atideśa to be considered is आश्रयोपस्थितिकल्पितवचनातिदेश. The principle involved herein will become clear from the following illustration.[2] Of the Jyotiṣṭoma sacrifice there are four different kinds mentioned in the Vedas, namely, *Agniṣṭoma*, *Ukthya*, *Ṣoḍaśī* and *Atirātra*, and another three mentioned in the Smṛtis, namely, *Atyagniṣṭoma*, *Vājapeya*, and *Aptoryāma*. These seven varieties are primarily called *Saṁsthās*. Saṁsthā literally means a hymn or a group of hymns sung at the end of a sacrifice. At the end of the Agniṣṭoma form of the Jyotiṣṭoma

[1] *Bhāṭṭadīpikā*, 7, 3, 9.
[2] *Ibid.*, 3, 6, 16.

sacrifice twelve hymns are sung which go by the name of Agniṣṭoma-stotra. In the Ukthya form three additional hymns are sung which are called the Ukthya-stotra. In the Ṣoḍaśi form one more hymn called the Ṣoḍaśi-stotra is sung, and in the Atirātra form three more hymns collectively called the Rātri-stotra and a hymn called the Āśvina-stotra are sung. The three other forms mentioned in the Smṛtis are the same as the said four with slight variations. Certain benefits are ordained to accrue from the said hymns, apart from the benefits contemplated by the sacrifices in which they are sung, so that two *bhāvanās* arise under the same context, one relating to the performance of the sacrifice, the other relating to the inclusion of a material, Mantra in the present case—in the course of a sacrifice. The question arises whether the rules of procedure prescribed for the sacrifice are also to be repeated for the latter. The answer is that although different benefits are contemplated by the different *bhāvanās*, so far as the latter Bhāvanā, that is Guṇakāmabhāvanā, is concerned, at the outset it is known as intimately connected with the Āśraya or the sacrifice in which it is observed so that the subsidiaries mentioned in the context first apply to the sacrifice, and there is no scope for their application to the Guṇabhāvanā. Hence the subsidiaries apply to the Āśraya by express statement, and by Atideśa the same are

imported into the peculiar performance connected with the material under question. This peculiar type of Atidesa is too technical and of little practical consequence.

By far the greatest portion of the rules extended by the principle of Atidesa is the result of *Codanāliṅgātidesa* or extension by analogy. Instances of the application of this peculiar kind of Atidesa are to be met with in plenty in works on Dharma sāstras, especially the more modern commentaries and digests. The principle is resorted to although the word Atidesa is itself not often used. The principle of this particular kind of Atidesa as applied by legal treatises is seen to manifest itself in multifarious phases. One of the peculiar aspects in which this Atidesa is applied is to be met with in cases where the law is extended by assigning the reason of *Nyāya Sāmya* or Parity of reasoning. An instance of the same may be drawn from the law of adoption. There is a text of Vasiṣṭha in the following terms.

[1] पुत्रं प्रतिग्रहीष्यन् बन्धूनाहूय राजनि चावेद्य निवेशनमध्ये व्याहृतिभिर्हुत्वा अदूरबान्धवं बन्धुसन्निकृष्ट एव प्रतिगृह्णीयात् ।

One desirous of adopting a son shall assemble the relations, inform the King, and in the centre of his residence make offerings to the fire by Vyāhṛtis, and shall adopt a son from his near relations.

[1] *Vasiṣṭha*, Adhyāya 15.

The various formalities directed to be observed by this text primarily apply to the taking of a son in the Dattaka form of adoption. But these have been extended by Mitākṣarā to the affiliations of sons bought, self-given and made. The reason for the extension of the procedure assigned by Mitākṣarā is Samāna Nyāya. Another text of Vasiṣṭha prohibits the adoption or the giving away in the Dattaka form of an only son of his natural parents.

[1] नत्वेवैकं पुत्रं दद्यात्प्रतिगृह्णीयाद्वा ।

By parity of reasoning, the prohibition of an adoption of an only son and also of the eldest son is extended to an affiliation of a son by purchase, that is in the Krītaka form. In the chapter relating to Strīdhana, Mitākṣarā refers to the sūtra of Gautama.

[2] स्त्रीधनं दुहितॄणामप्रत्तानामप्रतिष्ठितानां च ।

A woman's wealth devolves upon the daughters who are neither married nor provided for.

This text in so far as it regulates the order *inter se* among the daughters in the matter of succession is extended by Mitākṣarā to the case of a conflict among the daughters for priority in inheritance of the paternal estate on the ground of Samāna Nyāya. A text of Yājñavalkya runs thus :

[1] *Vasiṣṭha*, Adhyāya 15.

[2] *Gautama Dharmasūtra*, Adhyāya 28, Sūtra 25.

[1] विभक्तेषु सुतो जातः सवर्णायां विभागभाक् ।

A son born of a wife of an equal caste after partition gets the share of both parents.

If at a partition a member is affected by a defect disqualifying him from taking a share, but the same disappears subsequent to partition, the person thus freed from such disqualification is declared entitled to the share of his parents on the principle of Samāna Nyāya.

Another form in which the principle of Atides'a is represented in works on law is the idea of *Upalakṣaṇa* whereby a particular word or idea is taken to be illustrative of similar words or ideas. This principle is applied to the interpretation of the following text of Vasiṣṭha :

[2] तस्मिंश्चेत्प्रतिगृहीते औरस उत्पद्येत चतुर्थभागभागी स्याद्दत्तकः ।

When an adopted son is taken, and a legitimate son is born, the adopted son shall get a fourth share.

The word Dattaka in this text has been interpreted by Mitākṣarā to include by way of Upalakṣaṇa a son bought, a son made, etc.

[3] दत्तकग्रहणं क्रीतकृत्रिमादीनां प्रदर्शनार्थम् ।

[1] *Yājñavalkya Vyavahārādhyāya*, S'loka 122.
[2] *Vasiṣṭha*, Adhyāya 15.
[3] *Mitākṣarā Vyavahārādhyāya*, under S'loka 132.

Similarly, the word Datrima or adopted son is taken to mean and include all the secondary sons in the following text of Manu.

[1] गोत्ररिक्थे जनयितुर्न भजेद्दत्त्रिमः सुतः ।

An adopted son shall not participate in the family or the estate of his natural father.

The Mitākṣarā comment upon this text is

[2] दत्त्रिमग्रहणस्य पुत्रप्रतिनिधिप्रदर्शनार्थत्वात् ।

As the use of the word Datrima is intended to convey the substitute of a son.

Another illustration of the expansion of a rule of law by the principle of Upalakṣaṇa may be noticed in connection with the following text of Manu.

[3] स्त्रियास्तु यद्भवेद्वित्तं पित्रा दत्तं कथंचन ।
ब्राह्मणी तद्धरेत्कन्या तदपत्यस्य वा भवेत् ॥

"Whatever property may have been given by her father, to a wife (who has co-wives of different castes) that the daughter of the Brāhmaṇī (wife) shall take, or that (daughter's) issue."

In determining the order of succession to Strīdhana, this text is deemed to lay down that a daughter born of a wife belonging to a superior caste, has priority over the daughter of a wife of an inferior

[1] *Manu*, Adhyāya 9, S'loka 142.
[2] *Mītākṣarā Vyavahārādhyāya*, under S'loka 132.
[3] *Manu*, Adhyāya 9, S'loka 198.

caste. This general principle is deduced from the above text by Mitākṣarā by treating the word Brāhmaṇī as denoting an issue of a superior caste.

[1] ब्राह्मणीग्रहणं उत्तमजात्युपलक्षणम् ।

We have now dealt with the general principles of the development of law by Atides'a. An equally important factor in the growth of Hindu Law is the idea of Pratinidhi or substitute. The idea is scientifically treated by the Mīmāṁsakas who have laid down precise rules as to the character of a substitute, as to the extent to which the attributes of the original may be extended to the substitute. For example, when the Soma plant is not available for a sacrifice, the employment of a substitute by the use of the Pūtika plant is deemed to be permitted. As a result of the recognition of a substitute follow a number of rules which relate to Bādha. A good deal of Hindu Law may be said to have been evolved by the application of the principle of Pratinidhi. The peculiar body of rules relating to the fiction of adoption are a result of the idea of substitute. Manu says:

[2] क्षेत्रजादीन् सुतानेतानेकादश यथोदितान् ।
पुत्रप्रतिनिधीनाहुः क्रियालोपान्मनीषिणः ॥

[1] *Mitākṣarā Vyavahārādhyāya*, under S'loka 145.
[2] *Manu*, Adhyāya 9, S'loka 180.

Wise men declare these eleven sons beginning with Kṣetraja, the substitutes of a son, to prevent a failure of the funeral obsequies.

The result is, where there is no real son a fictitious son is recognised. By reason of his being a substitute for a legitimate son, an adopted son is generally invested by law with the status of a natural born son. The fiction of adoption is treated exactly in the same way as the birth of a real son. If a legitimate son acquires an interest by birth in the joint family property, an adopted son acquires a similar right by the act of adoption. If a natural born son can demand a partition of ancestral property in the hands of his father, an adopted son can equally do so. Like a posthumous natural born son, an adopted son is entitled to impeach the validity of a pre-adoption alienation made by his adoptive mother. The law of adoption is one of the most important branches of Hindu jurisprudence that owe their existence to the influence exerted by legal fictions, and when the fiction of sonship has determined the law of adoption in a peculiar way, the laws of joint family, partition, inheritance, etc., underwent a corresponding process of evolution.

Not merely is the law of adoption an exclusive outcome of the influence of a legal fiction, but there are other very important branches of law whose ultimate origin can be traced to the influence

of fictions. The evolution of a woman's rights of inheritance can be traced to the influence of an important legal fiction recognised by Hindu law. As in all other ancient societies, women were never recognised in the primitive law of the Vedic age as entitled to any share in any property. The family was supposed to consist entirely of males where women had no legal status. This state of society is sometimes described as the patriarchal stage. At this primitive stage women had absolutely no rights either of inheritance or of maintenance or of custody. This is a state of society that is referred to in the oft-quoted text of Bodhāyana.

[1] निरिन्द्रिया ह्यदायादाश्च स्त्रियः

Women are devoid of senses, and they are no participators (in property).

From out of this rigid rule, the woman's right has been gradually recognised by placing different limitations upon the scope of this rule at different stages in the development of Hindu Law. The chief instrumentality by means of which the rigidity of the rule was overcome was an important legal fiction which is recognised very early in Hindu Society as also in the systems of jurisprudence of other countries. The fiction by means of which a female's right to inherit sprang

[1] *Bodhāyana Dharma Sūṭra*, 2, 2, 47. Vide also *Taiṭṭirīya Saṁhitā*, 6, 6, 8.

into existence is one that is also met with in the early Common law of England, namely, the fiction of identity between the husband and the wife. Traces of the recognition of this fiction are noticeable at such an early period of Hindu society as that of Vājasaneya Brāhmaṇa which contains the following passage:

[1] अर्धो ह वा एष आत्मनः तस्माद्यज्जायां न विन्दते नैतावत्प्रजायते असर्वो हि तावद्भवति अथ यथैव जायां विन्दते अथ प्रजायते तर्हि सर्वो भवति। तथाचैतद्वेदविदो विप्रा वदन्ति 'यो भर्ता सैव भार्या स्मृता'।

A man is only a half of his self. Therefore when he takes not a wife he is not fully born, for he is incomplete so long. Then when alone he takes a wife, he is fully born, and he becomes complete. Accordingly Brahmins versed in Vedas declare this, 'The person known as husband is verily known as the wife.'

The fiction of identity of the husband and the wife in the eye of the law is repeated in the following text of Manu.

[2] एतावानेव पुरुषो यज्जायात्मा प्रजेति ह।
विप्राः प्राहुस्तथा चैतद्यो भर्ता सा स्मृताङ्गना॥

What is known as a wife, self and offspring, a man consists of the same. In accordance therewith

[1] *Kullūka Bhaṭṭa*, under Manu, Adhyāya 9, S'loka 45.
[2] *Manu*, Adhyāya 9, S'loka 45.

Brahmins declare this. He that is the husband is known as the wife.

A clearer reproduction of this idea is found in the following text of Bṛhaspati which upon the authority of the fictitious identity between a husband and a wife declares a widow to be entitled to succeed to the estate of a sonless husband in preference to all other heirs.

[1] आम्नाये स्मृतितन्त्रे च लोकाचारे च सूरिभिः ।
शरीरार्धं स्मृता भार्या पुण्यापुण्यफले समा ॥
यस्य नोपरता भार्या देहार्धं तस्य जीवति ।
जीवत्यर्धशरीरेऽर्थं कथमन्यः समाप्नुयात् ॥
सकुल्यैर्विद्यमानैस्तु पितृभ्रातृसनाभिभिः ।
असुतस्य प्रमीतस्य पत्नी तद्भागहारिणी ॥

In the sacred law, the Smṛti code and popular usage, a wife is recognised by wise men as half the body and an equal participator in good and bad fruits. Of him whose wife does not cease to live, half the body continues to live. When half the body lives, how can anybody else take the wealth (of a deceased)? While agnates are living including the father, brother and cousins, of a sonless deceased man, the widow takes the share.

The order in which the above texts are enumerated will serve to illustrate the gradual steps

[1] *Smṛticandrikā*, Mysore Government Oriental Library Series, No. 48, Page 673.

by which a widow's right to inherit came to be recognised under the Hindu law and the difficulties it had to contend against in the infancy of its history. Under the modern Hindu Law, the next heir to the estate of a sonless man in default of the widow is his daughter. Daughter is one of the five female heirs expressly mentioned by Smṛti texts, but the Smṛti law of inheritance is itself an improvement upon the earlier law represented by Āpastamba's text wherein women are described as not capable of owning property. The gradual growth of the right of the daughter to inherit was consequent upon the deviation from the original rule made in favour of the widow by means of the fiction of legal identity. Once an exception was made to the general rule, later jurists were emboldened to make further inroads in the same direction in favour of other female relations. The influence of the introduction of the widow into the list of heirs coupled with a fiction of identity between the father and his issues, male or female, accounts for the high rank that a daughter enjoys among the list of heirs under the Smṛti law. The fiction of identity between a father and a daughter is thus laid down in a text of Manu:

[1] यथैवात्मा तथा पुत्रः पुत्रेण दुहिता समा ।
तस्यामात्मनि तिष्ठन्त्यां कथमन्यो धनं हरेत् ॥

[1] *Manu*, Adhyāya 9, S'loka 130.

As is the self, so is the son, and a daughter is equal to a son. When the self stands in her form, how shall anyone else take away the estate?

Corresponding to the fiction of single personality of a husband and a wife, there are other fictions of identity known to Hindu Law,—as between master and slave, father and son, preceptor and disciple. The fiction seems to have at an early stage of the Hindu society impressed its influence upon the law of property. There is a text of Manu which evidently refers to a very primitive state of society when the son, the wife, the slave and the disciple had no independent legal recognition, and they were in the eye of law absolutely incapable of holding property in their own right. The text is as follows:

[1] भार्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।
यत्ते समधिगच्छन्ति यस्यैते तस्य तद्धनम् ॥

A wife, a son and a slave—these three are deemed to have no property. What they earn is the property of him to whom they belong.

The influence of the fiction of identity between the husband and the wife and between the father and the daughter on the Hindu law of inheritance has been already noticed. The special rules of inheritance regulating the succession of a Dāsīputra are to be accounted for by the fiction of identity between master and slave. The text relating to a

[1] *Manu*, Adhyāya 8, S'loka 416.

Dāsīputra originally intended to regulate the rights of inheritance of a son begotten on a female slave. With the abolition of slavery the principle was extended to a son born of a permanently kept concubine. The text of Yājñavalkya on the point is

[1] जातोऽपि दास्यां शूद्रेण कामतोंशहरो भवेत् ।
मृते पितरि कुर्युस्तं भ्रातरस्त्वर्धभागिकम् ॥

A son born of a Dāsi by a S'ūdra shall take a share at the desire (of his father). On the death of the father, the brothers ought to make him a sharer of a half.

Similarly there is another text of Yājñavalkya

[2] वानप्रस्थयतिब्रह्मचारिणां रिक्थभागिनः ।
क्रमेणाचार्यसच्छिष्यधर्मभ्रात्रेकतीर्थिनः ॥

Of a person retired to the forest, an ascetic and a bachelor, the sharers of the heritage are, in an inverse order, the preceptor, a good disciple, and a brother of the same Āsrama.

The rule of inheritance as laid down in this text has evidently resulted from the fiction of identity between a preceptor and a disciple.

It is interesting to note that when the several fictions of identity are acted upon in so far as the laws of property and inheritance are concerned, there are numerous branches of law which are left

[1] *Yājñavalkya Vyavahārādhyāya*, S'loka 133.
[2] *Ibid.*, S'loka 137.

untouched by their influence. And as a matter of fact, the Smṛtis even go the length of expressly negativing the reality of these identities. A brief survey of the limitations to the fiction of identity will clearly bring to light, which branches of law have come within the sphere of its influence, and which have escaped the same. In the context relating to Strīdhana, Yājñavalkya lays down as follows:

[1] दुर्भिक्षे धर्मकार्ये च व्याधौ संप्रतिरोधके ।
गृहीतं स्त्रीधनं भर्ता न स्त्रियै दातुमर्हति ॥

The husband need not return to the wife her peculium received during adversity, for the performance of obligatory ceremonies, during illness, and under pressure of impending confinement.

This text necessarily implies that in other cases wealth got from a woman ought to be returned by the husband, a rule which clearly militates against the theory of identity between a husband and a wife. Similarly in the text of Yājñavalkya:

[2] भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा ।
तत्र स्यात्सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि ॥

For, in the land that is acquired by a paternal grandfather, in the property yielding a recurring income

[1] *Yājñavalkya Vyavahārādhyāya*, S'loka 147.
[2] *Ibid.*, S'loka 121.

and in the chattel (acquired by the paternal grandfather) there shall be equal ownership of father and son.

This is a clear repudiation of the fiction of the merger of the son's personality in that of the father.

The following text of Nārada illustrates how in the case of a slave there are certain limitations placed upon the fiction of identity between him and his master.

[1] यश्चैषां स्वामिनं कश्चिन्मोचयेत्प्राणसंशयात् ।
दासत्वात्स विमुच्येत पुत्रभागं लभेत च ॥

Of these, he that saves his master from danger to life shall be freed from slavery, and he shall get a son's share.

An exception to the fiction of identity between preceptor and disciple is laid down in the following text of Gautama which recognises the validity of legal proceedings as betweeen both.

[2] शिष्यशिष्टिरवधेन । अशक्तौ रज्जुवेणुविदळाभ्यां तनुभ्याम् । अन्येन घ्नन् राज्ञा शास्यः ॥

The correction of a disciple shall be without the infliction of corporal punishment. In the case of inability, chastisement may be by means of a slender rope or bamboo twig. If he beats with any other (material), he shall be punished by the King.

[1] *Nārada Abhyupetyāsusrūṣāprakaraṇa*, S'loka 30.
[2] *Gautama Dharma Sūtra*, Adhyāya 2, Sūtras 49, 50, 51.

Another fiction which has exercised a most potent influence on the legal evolution is the conception that a child in the womb is equal to a child in existence. One of the principal consequences of the recognition of this fiction is that for legal purposes computation of age is ordinarily to be made from the date of conception and not of birth. This is the rule laid down by Gautama in his sūtra

[1] गर्भादिः संख्या वर्षाणाम्

The calculation of years begins from conception.

This rule as to computation of age is most material with reference to the fixing of the date for initiation or the date of attainment of majority. With reference to the initiation the principal age at which it ought to be performed for a Brahmin is the eighth year, and the optional dates are the ninth and fifth years. The general ages of initiation for a Kṣatriya and a Vāiśya are the eleventh and twelfth years.

[2] उपनयनं ब्राह्मणस्याष्टमे । नवमे पञ्चमे वा काम्यम् । एकादशद्वादशयोः क्षत्रियवैश्ययोः । आषोडशात् ब्राह्मणस्य सावित्री । द्वाविंशते राजन्यस्य । द्व्यधिकाया वैश्यस्य ।

The latest ages for initiation in the case of the three regenerate classes are the sixteenth, twenty-second

[1] *Gautama Dharma Sūtra*, Adhyāya 1, Sūtra 9.
[2] *Ibid.*, Adhyāya 1, Sutras 7, 8, 13, 14, 15 and 16.

and twenty-fourth years. In all these cases calculation is to be made from the date of conception. It seems that in computing the age of majority the same rule is to be observed. Nārada lays down the following rule regarding the date of the commencement of majority.

[1] गर्भस्थैः सदृशो ज्ञेयः आष्टमाद्वत्सराच्छिशुः ।
बाल आषोडशाद्वर्षात्पौगण्डश्चेति शब्द्यते. ॥

A child until the eighth year is known to be similar to those in the womb. Until the sixteenth year he is called a boy and a minor.

The difference between the Bengal school and the other schools of law on the question whether the beginning or the completion of the sixteenth year marks the commencement of majority is due probably to the rigidity or the looseness with which the fiction of a child in the womb being equivalent to a child in existence is applied by the respective schools. The influence of this fiction has deeply influenced the law relating to alienations of joint family property. The following texts will clearly illustrate the part played by this particular legal fiction on the development of law. Under the Mitākṣarā law, it is admitted on all hands that the existence of a son will be an impediment to the free right of alienation on the part of a father or manager of a family. This check upon the right of

[1] *Nārada Ṛṇādānaprakaraṇa*, S'loka 35.

alienation enures even for the benefit of a son conceived but not yet born.

[1] ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः ।
वृत्तिं च तेऽभिकाङ्क्षन्ति न दानं न च विक्रयः ॥

They that are born, they that are unborn, and they that remain in the womb require a means of living. Therefore there is no gift nor sale.
The prohibition contained in this text is described by Mitākṣarā as referring to the alienation of real property. The influence of this very same fiction is also to be noticed in the law of partition. In commenting upon the text of Yājñavalkya,

[2] दृश्याद्वा तद्विभागः स्यादायव्ययविशोधितात् ।

A partition shall be effected of the residue on taking to account the incomes and the outgoings, Mitākṣarā lays down that a partition, when the wife of one of the coparceners is pregnant, may be effected only when the pregnancy is not apparent, and even in such a case on the birth of a male child to the pregnant woman, the partition will have to be reopened. But when the pregnancy of a coparcener's wife is apparent, partition should be effected only after delivery.

[1] *Mitākṣarā Vyavahārādhyāya Dāyavibhāgaprakaraṇa*, Introductory.
[2] *Yājñavalkya Vyavahārādhyāya*, S'loka 122.

[1] एतच्च विभागसमयेऽप्रजस्य भ्रातुः भार्यायां अस्पष्टगर्भायां विभागादूर्ध्वं उत्पन्नस्यापि वेदितव्यम्। स्पष्टगर्भायां तु प्रसवं प्रतीक्ष्य विभागः कर्तव्यः।

One important exception to the generality of the above fiction relating to a child in the womb is to be noted in connection with the rule relating to a person's capacity to adopt a son. The rule of Atri is

[2] अपुत्रेणैव कर्तव्यः पुत्रप्रतिनिधिः सदा।

Only by a sonless man shall always a substitute for a son be taken.

The word "sonless" is nowhere interpreted so as to exclude a person whose male child has been conceived. The commentary of the word *Aputra* is made in the following terms: अजातपुत्र and मृतपुत्र, one of whom no son is born, and one whose sole surviving son is dead.

Next we pass on to consider the fiction of the duration of human memory under the Hindu Law. The importance of this fiction makes itself felt in distinguishing an ancient custom from a modern custom, for it is one of the essentials of a custom both under the English and Hindu systems of law that in order to be recognised by courts of law

[1] *Mitākṣarā Vyavahārādhyāya*, under S'loka 122.
[2] *Atri Smṛti*, S'loka 52.

it ought to be ancient. In fixing the date at which a custom becomes ancient, an arbitrary rule of law is fixed under the English Jurisprudence so as to extend the duration of human memory to cover the entire period subsequent to the reign of Richard I, and a custom becomes immemorial only if it precedes that date. The Hindu law is much more sensible in fixing the starting point of human memory. A distinction is made between *Smārta Kāla* and *Asmārta Kāla*, or the period within memory and the period beyond memory, by a reference to the question whether or not a particular custom has prevailed for a hundred years back from the date of the subject-matter for consideration. In dealing with possession as evidence of title, where the root of title is undisclosed, possession which dates back to a period beyond human memory, that is more than a hundred years old, is conclusive proof of ownership. In dealing with the comparative weight of possession and the lawfully recognised modes of acquisition of title, Yājnavalkya lays down :

[1] आगमोऽभ्यधिको भोगाद्विना पूर्वक्रमागतात् ।

Title is superior to possession, unless the latter has devolved in order from ancestors. From this text the Mitākṣarā deduces the following rules :

[1] *Yājñavalkya Vyavahārādhyāya*, S'loka 27.

[1] विना पूर्वक्रमागतादित्येतच्चास्मार्तकालविषयम् ।
आगमोऽभ्यधिको भोगादिति च स्मार्तकालविषयम् ॥

In the period within memory title is superior to possession, but beyond that possession is paramount. In fixing the duration of legal memory Mitākṣarā says:

[1] स्मार्तश्च कालो वर्षशतपर्यन्तः शतायुर्वै पुरुष इति श्रुते : ।

The duration of memory ranges up to a hundred years, for the scripture says, a man's age-limit is a hundred years.

As a result of the influence of the legal fiction of human memory upon the interpretation of the original text of Yājñavalkya, the law as thus altered is laid down by the more modern Kātyāyana in the following terms:

[1] स्मार्तकाले क्रिया भूमेः सागमा भुक्तिरिष्यते ।
अस्मार्तेऽनुभवाभावात् क्रमात्त्रिपुरुषागता ॥

The major portion of the chapter on Inheritance may be traced to the influence of the fiction of an heir's spiritual efficacy to offer funeral oblations to the person to whom succession is to be determined. The textual exception to the rule of escheat in case of properties left by a Brahmin dying without him surviving any of his next of kin is attributable to the *semi-divine* character of a

[1] *Mitākṣarā Vyavahārādhyāya*, under S'loka 27.

Sovereign which is presumed to depend upon his keeping good relations with the Brahmin hierarchy. The fictions that an idol is possessed of a juristic personality and that the head of a Mutt is a *corporation sole* and a person in the eye of the law may be referred to as having deeply influenced the law relating to religious endowments which in the present era has assumed an importance and magnitude disproportionately large, as compared with the law of Ancient India where gifts and bequests to individuals were much more common than donations in favour of institutions. In the same way it is possible to trace the development of many other modern rules of law to the influence of similar legal fictions on the original law laid down in ancient treatises. A description of the different stages at which and the different degrees in which each particular branch of law has been developed by legal fictions will find its appropriate place only in special historical works on particular branches of law.

INDEX

PAGE

Ācamana 117, 120
Ācāra 34, 152
Adhvaryu 100, 105
Adjective law, not derived from substantive law in Hindu law 35
occupying much less space than substantive law in Smṛtis 34
treatment of, by Manu and Yājñavalkya 34
Adoption, Dattaka form of, Kritaka form of, and of an only son 200
law of 141, 204
of daughters 142
son by 204
Adṛṣṭārtha Smṛtis 105, 123
Adultery 156
Āgneya 113, 114
Agni God 114
Agnihotra 56, 104, 174, 191
compulsory 192
in Kauṇḍapāyināmayana 192
Agnīṣomīya 113, 114
Agnīṣomīyapaśu 106, 107, 108, 109, 112
Agnīṣomīyasaṁsthā 103
Agniṣṭoma 197
Agniṣṭomastotra 198
Ahalyā 137
Āhavanīya 120
Ahiṁsā 134
Alienation, in the law of Real Property, history of the right of, of an estate in fee simple and of an estate tail 29
under Hindu law, distinction of properties with reference to 25

PAGE

Alienation, of immovable property, six formalities required to validate 26
of immovable property by gift of gold and water 27
Ambālikā 138
Ambikā 138
Aṅgiras 10, 172
Anuṣṭheyārthaprakāśana, function of Mantra 57
Anuvāda 62
Anūvandhyā 182
Āpastamba 10, 110, 111, 113, 114, 115, 125, 172, 208
Śrautasūtra 110, 125
Apauruṣeya theory of the origin of Vedas 49
Aptoryāma 197
Apūrva equal to Dharma in the Nyāya School 52
Aputra 216
Āraṇyakas 49
Arjuna 138, 139, 141, 142
marriage of 142
Artha 105, 123
Artha Bhāvanā 161, 162
Artha Śāstra 10, 126, 127, 128, 129
Arthavāda 53, 109, 173, 174
authority of 62
as the origin of Smṛti 94
condemnatory illustrated 61
effect of, in altering the meaning of Vedic text 64
eulogistic illustrated 60
Jaimini's theory of 59
Arthin 185, 187
Asmārtakāla 217
Āśrama 137, 139
Āśraya 198
Āṣṭakāsmṛti 96

PAGE

Aśvatthāman 139
Āśvinastotra 198
Ātatāyin 127, 128
Atharvaveda 102, 104, 172
Atideśa 108, 109, 110, 112, 190, 191, 192, 196, 197, 198, 199, 201, 203
by analogy 196
by reason of position 196
on account of Āśraya 196
Atirātra 97, 197, 198
Atri 10, 65, 172, 216
Atyagniṣṭoma 197
Audumbarādhikaraṇa 95
Austin 159, 160
theory of Positive law 158
theory of Command 163
Authority classified by Kumārila 98
Avabhṛtha 193
Avoidance of Lakṣaṇā, a test for distinguishing Nāmadheya 54
of Vākyabheda 55
Āyurveda 10

Bādha 190
Bengal School of Hindu Law 214
Bentham 8, 160
Bhāllavins, a school of Sāmaveda 80
Bhāṣya Bhāṣyakāra 99, 102, 106, 116, 117, 119
critical views of 101
disagreement between Vārtika and 95
Bhāṭṭa school of Mīmāṁsā 52
Bhāvanā 198
Bhīṣma 137, 139
Bhūtārthavāda 62
Bill of Middlesex 20, 21
Bodhāyana 10, 142, 143, 172, 205
Brāhmamuhūrta 139
Brahman 152
Brāhmaṇas 53
Brāhmaṇī 203
Brāhmapurāṇa 9
Branches of learning in Hindu Law 9, 10, 11
Bṛhaspati 10, 149, 153, 164, 173, 207
four courts mentioned by 43
Burden of proof 13, 186

Ca in Gautama's text 37

PAGE

Camasādhikaraṇa 116
Caṇḍāla 137
Cāndrāyaṇa 145
Caritra, territorial or provincial usage 149, 150, 152, 154
Cāturmāsya 194
Causes, four classes of 186
Cessante ratione cesset et lex 108
Chandas or Prosody 9, 125
Chāndogya of Jaimini 99
Citrā 55
Codanāliṅgātideśa 196, 199
Collector of Madura *vs.* Muthuramalinga 147
Command of the Sovereign 149, 150, 152, 158, 159, 164
Commands 160, 161
general 157
particular 157, 159
political 158, 159
Vedic 161, 162, 173
Commentaries on Dharmaśāstras 137, 166, 168, 175
Common Law Procedure Act, 1852 16, 18
Common law of England 206
Common law under the Hindu law 149, 152, 153, 154, 155, 156, 157, 159, 165
Constructive fraud 14
Constructive possession 14
Constructive Res Judicata 14
Constructive trust 14
Criminal law not separately dealt with in Smṛtis 35
Custom 132, 138, 144, 145, 146, 164, 165
Customary law 152, 153, 154, 156, 157, 159
Customs ancient and modern 216, 217

Dakṣa, founder of Dharmaśāstra 10, 173
Dāna 105
Darbha grass 115
Darśa 113
Darśapūrṇamāsa 107, 112, 113
Dāsīputra 209, 210
Dattaka, Dattrima 201, 202
Daughter's right to inherit in Hindu law 208
Dāyabhāga 168

PAGE

Detinue, fictions of pleading in 16, 18
abolished by Common Law Procedure Act of 1852 16, 18
Devatā 114
Devatādhikaraṇa of Jaimini 50
Dhanurveda or archery 10
Dharma 11, 105, 123, 133, 148, 149, 150, 151, 154, 161, 172, 173
defined by Jaimini 52
differently understood by different schools 52
Dharmaśāstra 10, 126, 127, 128, 129, 130, 142, 149, 152, 199
schools of: Eastern, Western, Northern, Southern 142
Dhṛtarāṣṭra 137, 138, 139
Digests 166
Divine being, ultimate author of Veda 171
Double presumption in the case of customs 145
Draupadī 137, 139
Droṇa 138
Droṇamukha 43
Dṛṣṭārthasmṛtis 105
Duty 160, 161
Dvau in Gautama's text 37

Easterners 146
Ejectment 18
Ekavākyatva between one recension and another of the same Veda 172, 174
between one Smṛti and another Smṛti 172, 174, 184, 187
between one Veda and another 172
between Vedas and Smṛtis 172
between Veda, Smṛti and Custom 172
theory of 170, 176, 177, 178, 190
English case law 167, 169
English law of Real Property, disappearance of fictions after enactment 16
distinction between Real and Personal property 29

PAGE

Epistemology 136
Equity 7
Estate tail 30
Exchequer 19, 22
Exegesis 9, 136

Fictio, in the Roman law properly a term of pleading 17
Fiction, fictions, legal fictions, as understood by an ordinary lawyer illustrated 18
defined by Bentham 8
defined by Sir Henry Maine 8
disappearance of, in the English law of Real Property 16
effect of, on procedure and Jurisdiction of Courts 8
evolution of Dāsīputra's rights of inheritance by 209
fundamental and derived 46
generally cease to be after legislation 15
Hindu law of Property evolved by 24
in a writ of latitat 19
in the Exchequer that the plaintiff was the king's debtor 16
in the Hindu law, of a gift in sale 26, 27
in the King's Bench that the defendant was in the custody of King's Marshal 16
in the Roman law, of a sale in gift 24
limitations to fiction of identity 211
living realities to a Hindu 5
never avowedly recognised as a source of law 9
of absolute concord among the legal sources 171
of adoption in Hindu law 203, 204
of a lease in actions by a freeholder 16
of a semi-divine character of the Sovereign, and its influence on the law of escheat 218
of a suit at law in the English Fines and Recoveries 23

PAGE

Fiction of a Vedic origin of S'iṣṭācāra 4
  of a Vedic origin of Smṛti 4, 116
  of Ekavākyatva 170
  of emanation of later law from original source rigidly kept up in Hindu law 5
  of human memory in English law 217
  of human memory in Hindu law 216, 217, 218
  of identity between father and issue 208; and its limitations 211
  of identity between father and son 209
  of identity between husband and wife 206; and its limitations 211
  of identity between master and slave 209; and its limitations 212
  of identity between preceptor and disciple 209; and its limitations 212
  of omniscience, infallibility and eternity of Vedas 46
  of pleading in Trover and Detinue 16, 18
  of spiritual efficacy to offer funeral oblations 218
  of the all-comprehensiveness of the archaic law 166
  of the exclusive authority of Veda on law, religion, morality and its effect in making Hindu law flexible 4
  one of the three instrumentalities of bringing law into harmony with society 7
  prevalent in modern law 13, 14
  that a child in the womb is equal to a child in existence 213; and its influence on the computation of age, age of majority and age of initiation 213; and its influence on the law of majority and of alienation 214; and its limitation in the law of adoption 216

PAGE

Fiction that a king can do no wrong 157
  that an idol is a person in law 219
  that the head of a Mutt is a corporation sole 219
  the earliest contrivance of a Jurist to transform law 12, 13
  their influence on the law of procedure and formation of Substantive law in Rome 17
Fine 29, 31
Fines and Recoveries 23, 31

GĀNDHARVA 10
Gārhapatya 120
Gautama 10, 172, 176, 189, 200, 212, 213
  anterior to Yājñavalkya 37
  co-existence of different bodies of law 39
  compared with Manu and Yājñavalkya on rules relating to constitution of courts 39
  Dvau and Ca explained in the text of 37
  mention of King and learned Brahmin by 37
Gavāmayana 192
Grahaikatva discussion 115
Grahas, meaning of 76, 115
Guṇabhāvanā 198
Guṇakāmabhāvanā 198
Guṇavāda 62

HĀRĪTA 10, 172, 186, 187
Havis Sacrifices in Vais'vadeva 195
Hetuvannigadādhikaraṇa 66
Hindu Judiciary, constitution of the ancient 36
Hindu Jurisprudence 147, 158, 168, 169, 171
Hindu law 159
  abrogation of practices 178
  absence of fictions accounted for 35
  accommodating nature of 4
  development of, by interpretation 166
  first inroad on inalienability made in favour of gift 24

PAGE

Hindu law lacking in fictions in the strict sense 8
Maine's theory of the largeness of procedure inapplicable to 34
of property 23
its development as compared with Roman law 24
procedure in 184
sources of, according to Yājñavalkya 9
Substantive law not derived from Adjective law 35
transitional stage in 178
widow's right to inherit 207
Holākā, Holākādhikaraṇa 146
Homa 97

INDRA 137
Indradadhi 113
Indrapayas 113
Inferior, inferiority 158, 160
In jure cessio explained 23
Institutes of Justinian 15
Iṣṭi 107
Iṣu 196
Īśvara 139
Itihāsas 124
Itikartavyatā 162

JĀGHANĪ 112, 113
Jaimini 50, 66, 99
Japa 104
Jīvadvibhāga 82
Jñānakāṇḍa 61
John Doe 19
Judicial legislation 167, 168
Jus Naturale 151
Justice, equity and good conscience 149, 151, 153, 154, 159
Jyotiṣa 9, 125
Jyotiṣṭoma 103, 107, 110, 197

KĀLIDĀSA, Raghuvaṁśa of 75
Kalpa or manual of Vedic rites 9
Kalpasūtras included in Smṛtis 74, 106, 108, 109, 113, 124
Kalpitavacanātideśa 196
Kāma 123
Kāmandaka 126
Kamaṇḍalu 178
Kāmya Vidhis 160, 161
Kapālas 106, 113

PAGE

Karmakāṇḍa of Vedas 61
Kāṭhaka 121
Kātyāyana 10, 150, 152, 164, 173, 218
Kauṇḍapāyināmayana 191, 192
Kaustubha 139, 141, 172
Kauṭalya 43, 126
Khalevāli 197
Khaṇḍadeva 96, 101, 120, 122, 141, 142
King, king's deputy 37, 41, 149, 158, 159, 163, 164
King's Bench, fiction that the defendant was in the custody of King's Marshal 19
issue of a Bill of Middlesex 20, 21
King's Court 38, 40, 41
Kratvartha explained 90, 121
Kṛṣṇa 138, 142
Kṣetraja 204
Kula, a class of Court 39, 41
Kumārila Bhaṭṭa 72, 95, 101, 102, 103, 104, 116, 117, 119, 120, 121, 122, 134, 135, 145
Kunti Bhoja 141

LAND TRANSFER ACT 16
Lāṭa country 140
Latitat, writ of 16, 19, 20, 21
Law 9, 158, 159
conservative in nature, conflict with civilisation 2
four classes of 149
written and unwritten 149
of Inheritance 218
of limitation 188, 190
of presumptions, a survival of fictions in the modern age 13
of property, influence by fictions of identity 209
Learned Brahmin, Jurisdiction exercised by 37
Legal enactments rare in the history of India 170
Legislation 7, 149, 152, 153, 154, 157, 158
Librepens 23
Likhita 10, 173, 176
Locke 160
Lokasiddha Smṛtis 124, 125
Lokasiddha texts 130

MADANAPĀRIJĀTA 142

PAGE

Mahābhārata 48, 139
Maine, Sir Henry, Ancient law 6
fiction defined by 8
theory about the disproportionate largeness of procedure in all archaic law 34
theory criticised with reference to Hindu law 34
theory that civil law is derived from criminal law, criticised 34, 35
Mallinātha 76
Mancipatio, Mancipation 23
Mancipium 23
Mandlik, Hetuvannigadādhikaraṇa as viewed by 67
Mantra 53
as the origin of Smṛti 94
function of 57
the threefold distinction of 57
Manu 10, 39, 127, 132, 144, 172, 175, 176, 188, 196, 202, 206, 208
Manus 23
Maternal uncle's daughter 145
Matvarthalakṣaṇā 55
Mīmāṁsā 9, 137, 144, 165
Mīmāṁsakas, Mīmāṁsā school 49, 111, 112, 116, 121, 122, 132, 133, 135, 147, 148, 149, 160, 161, 164, 203
Mitākṣarā 9, 10, 25, 126, 127, 128, 130, 168, 179, 180, 181, 182, 183, 184, 185, 187, 188, 190, 194, 196, 200, 202, 203, 215, 217, 218
fiction of a gift laid down in a sale 26, 27
Pūga, S'reṇi, Kula explained by 38
rules of Jurisdiction of Courts summarised in 41
Mitrāvaruṇa 181, 182
Modern law, another form of archaic law in theory 12
fictions prevalent in 14
Mokṣa 105, 123

NAHUṢA 137
Naimittika 160, 161
Nāmadheya 53, 173
Four tests for distinguishing 54

PAGE

Nāmātides'a 191, 192, 194, 195
Nārada 42, 164, 212, 214
New moon and Full moon sacrifice 193
Nirukta or Etymology 9, 126
Nitya vidhis 160, 161
Niyoga, practice of 175, 178, 181, 182
Non est inventus, return of, endorsed on the Bill of Middlesex 20, 21
Non-vedic school of thinkers 135
Northerners 142
Nyāya 9
Nyāyamūla Smṛtis 123, 124
Nyāyasāmya 199
Nyāya school on the origin of Vedas 49
denotation of Dharma under 52

PĀṆḌU 138
Parās'ara 10, 173, 176, 177
Parās'ara Mādhavīya 190
Paryagnikaraṇa 115
Pas'u 106, 115
Pas'u Puroḍās'a 109
Pas'u-yāga 106, 107, 109
Pas'vekādas'inī 111, 112, 113
Patnīsaṁyāja 111, 112
Pauruṣeya theory of origin of Vedas 49
Payo-yāgas 112
Phala 161
Plea of admission 187
Pleas, four kinds of 186
Pollock, Sir Frederic 15
Popular Court in ancient India 36, 40
Positive law 130, 132, 148, 152, 163, 164, 166
Potestas 23
Prābhākara school, denotation of Dharma under 52
Pracchannavāda 71
Prāḍvivāka 37
Prajāpati 137, 138
Prakṛti sacrifices 107, 109, 110, 191, 197
Praṇayana 194, 195
Pratinidhi 190, 203
Pratipatti 112
Pratiṣedha 173

PAGE

Pratiṣedha generally included in Vidhi 53
Pratyakṣavāda 72
Pravara 145
Prāyaṇīya 192, 193
Prāyaścitta 34, 105, 152
Prayoga Vidhi 118, 119
Presumptions, law of, a survival of fictions in the modern age 13
Privy Council 147, 148, 164, 165
Pṛthā, mother of Arjuna 141
Pūga 38, 42
Purāṇa 124
explained by Mitākṣarā 9
Pūrṇamāsa 113
Puroḍāśa 106, 109, 113, 114, 115
sacrifice 107, 108, 109
Puruṣārtha 91, 121
Pūrva Mīmāṁsā 106, 108, 111, 113, 145, 174
Pūrvapakṣa 106
Pūtīka plant 203
Putra 141

RĀJADHARMAPRAKARAṆA 158
Rājaśāsana 149, 154
Rājasūya 194
Rāmāyaṇa 141
Rātristotra 198
Recovery 32
Remembrance 11
Res Judicata 186, 187
Res mancipi 22, 23
Res nec mancipi 22
Responsa Prudentium 167, 169
Revelation 11
Ṛg Veda 48
21 Śākhas of 172
Richard Roe 19
Ṛk 172
Jaimini's definition of 57
Rohiṇī, stepmother of Kṛṣṇa 140
Roman Jurisprudence 169
substantive law derived entirely from procedure 16
Roman law 151, 167
alienation of Res mancipi 23
deemed to be embodied in the Law of The Twelve Tables 11
first inroad in favour of sale 24

PAGE

Roman law, gift, exchange etc., modelled on sale 24
settled and declared by the Institutes of Justinian 15
Roman Praetor 7
Royal Court in Ancient India 36

ŚABARASVĀMIN 97, 102, 117, 119, 121, 122
author of Mīmāṁsā Bhāṣya 95
humorous remarks of 100
Śabdabhāvanā 161, 162
Śabdaprayoga 151
Śacī 137
Sādhana 162
Sādhya 162
Sāhasa, treatment by Yājñavalkya of 35
Śākhāntarādhikaraṇa 174
Śākhās 174
Samācāravirodha 179, 183
Sāman 57, 172
Samāna nyāya 200, 201
Sāma Veda 48
thousand Śākhās of 172
Saṁskārakarma 112
Saṁsthās 197
Saṁvarta 10, 173
Sanction 160, 161
Saṅgraha 43
Śaṅkara 5
Śaṅkha 10, 173, 176
Sanskritic law of limitation 188
Śāstra Dīpikā 76
Śātātapa 10, 173
Satisfaction of one's own conscience 11
Śātyāyani Śākhā 99
Savanīyapaśu 108, 109
Self acquisition 183
Semasiology 140
Settled Land Act 16
Siddhavannirdeśa 74, 76
Śikṣā or Phonetics 9, 124
Śiṣṭa 133, 137
Śiṣṭācāra 132, 141
Śiṣṭākopādhikaraṇa 117
Śiṣṭatraivarṇikaparigraha 132, 165
Ślokavārtika of Kumārila Bhaṭṭa 72
Smārta 120, 121
Smārta kāla 217

PAGE

Smṛti, Ṣmṛtis 4, 10, 44, 102, 103, 104, 108, 116, 117, 118, 119, 122, 123, 124, 127, 128, 129, 132, 142, 145, 146, 150, 151, 152, 153, 158, 159, 162, 163, 164, 165, 166, 168, 170, 175
- age, Maine's theory inapplicable 34
- ancient 144
- anticipated in Vedas 87
- binding by acceptance of community 94
- derived from Arthavāda by Siddhavannirdes'a 74, 75, 77, 79, 86, 87, 91
- derived from Mantras 88, 89, 90, 91, 92
- eighteen principal 172
- era of legal literature 174
- foundation of authority of 94
- indication that criminal law is a creature of Civil law 35
- in Sūtra style 172
- involved by necessary implication 87
- law of Inheritance 208
- literal meaning of 70
- metrical 172
- origin of 122
- representing law in an advanced stage of society 4
- restricted application of 176
- text lost or unknown 144
- traceable to Vedic originals 94

Smṛti Candrikā 143, 156
Smṛti Muktāphala 143
Smṛtipāda 145
Ṣoḍais'saṁsthā 197, 198
Ṣoḍas'istotra 198
Ṣoḍas'ī vessel at Atirātra 97
Soma Juice 115
Soma plant 103, 104, 203
Somayāga 107, 193, 194, 195
Southerners 143
Sovereign 158, 159, 160, 162, 163, 170
- command of 157

S'reṇi 38, 41
S'ruti 102, 103, 104, 114, 116, 117, 118, 119, 120, 121, 122, 146
- conflict with Smṛti 95, 116
- different theories about the foundation in 70

PAGE

S'ruti, literal meaning of 70
- presumed by a Smṛti 94
- text lost or unknown 144

Statute de donis conditionalibus 30
Statutes 158
Stenātides'a 196
Sthānāpattyatides'a 197
Sthānīya 43
Strīdhana 200, 202, 211
Subhadrā 138, 139, 140
S'ukra 126
Superior, Superiority 158, 160
S'ūra 141
Svataḥ prāmāṇya of Veda 135
S'vetās'vatara 80
S'yena 56, 195, 196

TADDHITA 114
Tadvyapades'a nyāya 56
Tantravārtika 72
Tarkavidyā 9
Tatprakhyanyāya 55
Theory of Lost S'ruti 70, 71, 72
- Latent S'ruti 71, 72
- Patent S'ruti 72

Tradition or delivery 23
Trayī 172
Trover 16, 18
Tupṭīkā 72
Tvā termination 118

UDBHIDADHIKARAṆA, UDBHID 54, 55
Uddes'ya 115
Uddhāra, meaning of 82
Uddhāravibhāga 180
Udgātṛ priest 96
Udumbara wood 96
Ūha 190
Ukthya 110, 197, 198
Ukthyastotra 198
Unequal partition 181, 182
Uniformity of Process Act 16
Upades'a 108
Upalakṣaṇa 201, 202
Upāṁs'uyāja 113
Upaniṣads 49
Upavīta 121
Ūrvas'ī 137
Usages local, tribal, etc. 149
- authority of 165

Us'anas 10, 172
Uṣas 137, 138
Utsannavāda 70

PAGE

VACANAMŪLA SMṚTIS 123
Vacanātideśa 191
Vaisarjanahoma 100, 105
Vaiṣṇava 194
Vaiśvadeva 195
Vājapeya 197
Vājasaneya Brāhmaṇa 206
Vākyabheda 55
Valid custom 11
Vapā 103
Vārtika 97
Vārtikakāra, vide Kumārila 99
Varuṇapraghāsa 193, 194, 195
Vasiṣṭha 10, 137, 141, 172, 199, 200, 201
Vasudeva 139, 141
Vedāṅgas 9, 124, 125,
Vedas 9, 39, 46, 47, 48, 49, 50, 51, 52, 54, 57, 58, 59, 61, 62, 63, 69, 71, 73, 74, 76, 78, 87, 89, 90, 120, 122, 132, 133, 134, 135, 136, 137, 165, 166, 171, 172, 173
  archaic law of 12
  dharma, subject-matter of 52
  eternity of 4, 48
  fourfold classification of 53
  infallibility of 4, 51
  omniscience of 4
  only authority on law, religion and morality 4
  śiṣṭācāra read into the lines of 4
  smṛtis supposed to be derived from 4
Vedasiddhasmṛtis 124, 125
Vedic basis of Smṛti, limitations on the theory of 95
Vedic commands 161, 162

PAGE

Vidhi 94, 160, 161, 162, 173, 174
  explained 53
  the only operative portion according to Jaimini 60
Vijñāneśvara 131, 189
Vikalpa tainted with eight flaws 96
Vikṛti 107, 108, 111, 191, 197
Viṣṇu 10, 172, 194
Viśvāmitra 137
Viśvarūpa 79
Vṛddhavyavahāra 125
Vṛtra 137
Vyāhṛti homa 141
Vyākaraṇa or Grammar 9, 125
Vyāsa 10, 138, 139, 173
Vyavahāra 34, 130, 149, 150, 151, 152, 153, 154, 155
Vyavahārādhyāya 34
Vyavahāramayūkha 190

WILL of the State 159
Writ of latitat 16, 19

YĀJÑAVALKYA 10, 34, 35, 37, 40, 126, 127, 129, 130, 155, 172, 175, 176, 179, 180, 182, 185, 187, 188, 189, 190, 200, 210, 211, 215, 217, 218
  dharmaśāstra explained by 10
  sources of law enumerated by 9
Yajñopavīta 121
Yajurveda 49
  101 Śākhās of 172
Yajus 57, 172
Yama 10, 173
Yudhiṣṭhira 137, 139
Yūpa 110, 111, 197

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